TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1910.

No. [redacted] 159.

FIFTH AVENUE COACH COMPANY, PLAINTIFF IN ERROR,

vs.

THE CITY OF NEW YORK.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED FEBRUARY 23, 1909.

(21,528.)

(21,528.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908.

No. 732.

FIFTH AVENUE COACH COMPANY, PLAINTIFF IN ERROR,

vs.

THE CITY OF NEW YORK.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 13, 1909.

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a Court of Appeals of the State of New York.

On Appeal from Appellate Division of the Supreme Court, First Department.

FIFTH AVENUE COACH COMPANY, Appellant,
against
THE CITY OF NEW YORK, Respondent.

CASE ON APPEAL.

Page, Crawford & Tuska, attorneys for appellant, 32 Liberty Street, Borough of Manhattan, City of New York.
Francis K Pendleton, corporation counsel, attorney for respondent, Hall of Records, Borough of Manhattan, City of New York.

b Court of Appeals.

STATE OF NEW YORK, *ss:*

Pleas in the Court of Appeals, held at the Capitol, in the City of Albany, on the 5th day of January, in the year of our Lord one thousand nine hundred and nine, before the Judges of said Court.

Witness The Hon. Edgar M. Cullen, Chief Judge, presiding. W. H. Shankland, Clerk.
Remittitur, January 6, 1909.

FIFTH AVENUE COACH COMPANY, Appellant,
against
THE CITY OF NEW YORK, Respondent.

Be it remembered, that on the 16th day of July, in the year of our Lord, one thousand nine hundred and eight, Fifth Avenue Coach Company, the appellant in this action, came here into the Court of Appeals, by Page, Crawford & Tuska, its attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order and judgment of the Appellate Division of the Supreme Court in and for the First Judicial Department. And the City of New York, the respondent in said action, afterwards appeared in said Court of Appeals by Francis K. Pendleton, Corporation Counsel, its attorney.
Which said Notice of Appeal and the return thereto filed as aforesaid are hereto annexed.

Whereupon, the said Court of Appeals having heard this
c cause argued by Mr. William H. Page, of counsel for the appellant, and by Mr. Theodore Connolly, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate division of the Supreme Court appealed from in this action, be in all things affirmed. And it

was further ordered and adjudged that the respondent recover against the appellant costs of appeal to this Court.

And it was also further ordered that the record aforesaid, and the proceedings in this Court be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be in all things affirmed with costs as aforesaid, and stand in full force, strength and effect.

And hereupon, as well *as* the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid by them given in the premises, are by the said Court of Appeals, remitted into the Supreme Court of the State of New York before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the justices thereof, etc.

R. M. BARBER,
Deputy Clerk of the Court of Appeals,
of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
ALBANY, *January 6th,* 1909.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the Court of Appeals, with the papers originally filed therein, attached thereto.

[SEAL.] R. M. BARBER,
Deputy Clerk.

1 Court of Appeals of the State of New York.

On Appeal from Appellate Division of the Supreme Court, First Department.

FIFTH AVENUE COACH COMPANY, Appellant,
against
THE CITY OF NEW YORK, Respondent.

Case on Appeal.

Statement.

1907.

Aug. 30, Summons and Complaint served.

Oct. 14, Answer served.

Dec. 17-18, Trial before Hon. David Leventritt at Special Term, Part IV.

1908.

Jan. 27, Decision filed and served.

Jan. 27, Judgment entered dismissing complaint upon the merits and for $74.57 costs against plaintiff.

Jan. 30, Notice of appeal filed and served.

Feb. 4, Notice of exceptions to decision filed and served.

June 5, Order of affirmance entered.
June 11, Judgment of affirmance entered.
June 19, Notice of appeal to Court of Appeals filed and served.

There has been no change of parties or of attorneys herein. The case as hereinafter printed contains the judgment roll, the plaintiff's notice of appeal from said judgment, the opinion of the Court, the decision and notice of exceptions thereto, and all the evidence taken and proceedings had upon the trial herein. Said case also contains the order of affirmance of the Appellate Division, the judgment of affirmance, the opinions of the Appellate Division and the notice of appeal to Court of Appeals.

2 Supreme Court, New York County.

FIFTH AVENUE COACH COMPANY, Plaintiff,
against
THE CITY OF NEW YORK, Defendant.

Notice of Appeal.

SIR: Please to take notice that the plaintiff herein hereby appeals to the Appellate Division of the Supreme Court for the First Department, from the judgment of this Court entered herein in the office of the Clerk of the County of New York on the 27th day of January, 1908, in favor of the defendant against plaintiff, dismissing the complaint herein upon the merits, and for the sum of seventy-four and 57/100 dollars ($74.57), the amount of costs taxed against plaintiff, and from each and every part of said judgment.

Dated New York, January 29, 1908.

PAGE, CRAWFORD & TUSKA,
Attorneys for Plaintiff, 32 Liberty Street,
Borough of Manhattan, City of New York.

To Hon. Francis K. Pendleton, Corporation Counsel, Attorney for Defendant, Hall of Records, Borough of Manhattan, City of New York.

Hon. Peter J. Dooling, Clerk of the County of New York.

3 Supreme Court, New York County.

FIFTH AVENUE COACH COMPANY, THE CITY OF NEW YORK,
against
THE CITY OF NEW YORK, Defendant.

Summons.

To the above named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the Plaintiff's Attorney within

twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated New York, August 30, 1907.

PAGE, CRAWFORD & TUSKA,
Attorneys for Plaintiff, 32 Liberty Street,
Borough of Manhattan, City of New York.

4 Supreme Court, New York County.

FIFTH AVENUE COACH COMPANY, Plaintiff,
against
THE CITY OF NEW YORK, Defendant.

Complaint.

The plaintiff for its complaint herein alleges as follows:

First. It is a corporation duly formed and organized under the laws of the State of New York and engaged in the operation of automobile stages upon routes extending along Fifth avenue and other streets in the Borough of Manhattan, City of New York, under and in pursuance of various acts of the Legislature of New York, including chapter 536 of the Laws of 1886; chapter 182 of the Laws of 1889; chapter 657 of the Laws of 1900, and chapter 466 of the Laws of 1901. By proceedings duly had under said various acts the plaintiff has acquired all the property, rights, franchises and powers of the Fifth Avenue Transportation Company, Limited, mentioned in said Acts of 1886 and 1889. By proceedings had under said Acts of 1900 and 1901, the plaintiff has duly extended and now operates its routes.

Second. The defendant, The City of New York, is a municipal corporation organized and existing under and by virtue of
5 chapter 466 of the Laws of 1901, and the acts amendatory thereof, and exercising its powers through the medium of various departments, which, among others, include the Mayor, Department of Police, President of the Borough of Manhattan, Department of Highways and Bureau of Encumbrances, the powers and functions of which are specified in said chapter.

Third. The plaintiff has operated stages upon its routes and has made use of the interior of said stages for the display of advertising signs or matter for many years.

Fourth. In or about the month of May, 1905, the plaintiff began utilizing the exterior portions of its stages for advertising purposes and with the complete substitution of automobiles stages for horse stages upon its routes which was effected during the month of July last, began to utilize and now utilizes the exterior of its said stages more extensively for said purposes which it is able to do by reason of the necessary difference in the form of the new vehicles and in the consequent increase of space adapted for use in the display of advertising matter.

Fifth. The use of said space on said vehicles for advertising purposes as aforesaid enables the plaintiff to secure a substantial income from portions of its property required in the construction of its stages for transportation purposes but not susceptible of being used otherwise for the purposes of its business.

Sixth. The defendant, through various of its officials and
6 departments, has interfered with the operation of plaintiff's advertising upon the exterior of its said stages and with the operation of said stages; and, upon information and belief, the plaintiff avers that the defendant threatens and intends through its departments and officials to continue to interfere with the operations of the plaintiff's said stages by force and to prevent it from maintaining advertising signs upon the exterior thereof.

Seventh. Such interference with the operation of plaintiff's said stages, and with advertising signs displayed on the exterior thereof, threatened as aforesaid, will materially hamper the plaintiff's business; will reduce its income, will interfere with the exercise of its rights and franchises granted by and under authority of the State of New York and will infringe its constitutional right to freedom in the use of its property. The damage resulting to the plaintiff from said acts of the defendant will be irreparable and no adequate compensation therefor can be obtained in an action at law.

Wherefore, the plaintiff demands judgment permanently enjoining and restraining the defendant, its officials, departments, bureaus, and its or their respective agents, employees and attorneys, and all persons authorized to act for the defendant or claiming to act for or under it, from interfering in any way with the property of the plaintiff; that is, with the advertising signs or matter permitted, placed or used by the plaintiff or under its direction upon the exterior of the stages or any of them operated upon its routes in the Borough of Manhattan, City of New York, or from molesting
7 or in any way interfering with said stages or the operation thereof, and for such other further or different relief as may be proper, besides the costs and disbursements of this action.

PAGE, CRAWFORD & TUSKA,
Attorneys for Plaintiff, 32 Liberty Street,
Borough of Manhattan, City of New York.

STATE OF NEW YORK,
County of New York, ss:

Richard W. Meade, being duly sworn, deposes and says that he is the President and an officer of the Fifth Avenue Coach Company, the corporation plaintiff in the above-entitled action; that the foregoing complaint is true to the knowledge of this deponent, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true; that the reason why this verification is not made by the plaintiff is because the plaintiff is a corporation, and the grounds of deponent's belief as to all matters in said complaint not stated upon his knowledge are investigations which deponent has caused to be made concerning the subject matter of this action and information acquired by the de-

ponent in the course of his duties as such officer of the corporation-plaintiff in this action.

RICHARD W. MEADE.

Sworn to before me this 30th day of August, 1907.

ARTHUR J. RONAGHAN,
Notary Public, New York County.

8 Supreme Court, County of New York.

FIFTH AVENUE COACH COMPANY, Plaintiff,
against
THE CITY OF NEW YORK, Defendant.

Answer.

The defendant, answering the complaint by Francis K. Pendleton, Corporation Counsel, respectfully shows:

First. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in the paragraph of the complainant contained marked "First."

Second. Admits that plaintiff has operated stages on some of its routes and has made use of the interior of some of its stages for the display of advertising signs or matter, but denies knowledge or information sufficient to form a belief as to the truth of the other allegations in the paragraph of the complaint contained marked "Third."

Third. Admits that in the month of July, 1907, plaintiff began to utilize and now utilizes the exterior of its said stages ex-
9 tensively for advertising purposes, but denies knowledge or information sufficient to form a belief as to the truth of the other allegations in the paragraph of the complaint contained marked "Fourth."

Fourth. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in the paragraph of the complaint contained marked "Fifth."

Fifth. Upon information and belief, defendant denies that it, through various of its officials and departments, has interfered with the operation of stages, and that defendant threatens and intends, through its departments and officials, to continue to interfere with the operation of the plaintiff's stages by force, as alleged in the paragraph of the complaint contained marked "Sixth."

Sixth. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in the paragraph of the complaint contained marked "Seventh."

And for a further, separate and distinct defense:

Seventh. That on the 6th day of June, 1882, the Board of Aldermen of The City of New York adopted, and on the 19th day of June, 1882, the Mayor of the City of New York approved the following ordinance:

"The Mayor, Aldermen, and Commonalty of the City of New York do ordain as follows:

"SECTION 1. That no advertising trucks, vans, or wagons shall be allowed in the streets of the City of New York, under a penalty of ten dollars for each offense.

"SEC. 2. Nothing herein contained shall prevent the putting of business notices upon ordinary business wagons, so long as such wagons are engaged in the usual business or regular work of the owner, and not used merely or mainly for advertising.

"SEC. 3. All ordinances and resolutions, or parts thereof, inconsistent or conflicting with the provisions of this ordinance are hereby repealed.

"SEC. 4. This ordinance shall take effect on the first day of July, 1882."

That said ordinance remained in full force and effect until the adoption by the Board of Aldermen of said City on the 9th day of March, 1897, and the approval by the Mayor thereof on the 15th day of March, 1897, of the Revised Ordinances of the Mayor, Aldermen and Commonalty of The City of New York, more particularly Sections 669 and 670 thereof, which reads as follows:

"SEC. 669. No advertising trucks, vans or wagons shall be allowed in the streets of the City of New York under a penalty of ten dollars for each offense.

"SEC. 670. Nothing herein contained shall prevent the putting of business notices upon ordinary business wagons so long as such wagons are engaged in the usual business or regular work of the owner, and not used merely or mainly for advertising."

That said Sections 669 and 670 of the Revised Ordinances, as aforesaid, remained in full force and effect until the adoption by the Board of Aldermen of said City on the 30th day of October, 1906, and the approval by the Mayor thereof on the 8th day of November, 1906, of the Code of Ordinances of said City, Section 41, of Chapter 2, of Article IV, of Part II, thereof, being as follows:

"SEC. 41. No advertising trucks, vans or wagons shall be allowed in the streets of the Borough of Manhattan, under a penalty of ten dollars for each offense. Nothing herein contained shall prevent the putting of business notices upon ordinary business wagons, so long as such wagons are engaged in the usual business or regular work of the owner, and not used merely or mainly for advertising."

which said provisions have since the approval by the Mayor of said City, as aforesaid, been and now are in full force and effect.

Eighth. That the display of the advertisements on the outside of the stages operated by plaintiff on Fifth Avenue, Borough of Manhattan, City of New York, was and is in violation of said ordinance and of the laws of the State of New York, more particularly of the Greater New York Charter, and constitutes an unauthorized use of the public streets and a nuisance.

Ninth. That by reason thereof, it became and still is the duty

of the defendant in the discharge of its duty to prevent such unauthorized use of its streets and to abate such nuisance, and it is the desire of defendant so to do by preventing the display of the advertisements on the outside of the stages operated by plaintiff on Fifth Avenue, Borough of Manhattan, City of New York.

12 Wherefore, defendant demands judgment that the complaint herein be dismissed with costs.

FRANCIS K. PENDLETON,
Corporation Counsel, Attorney for Defendant.

Office and Post Office Address, Hall of Records, Borough of Manhattan, New York City.

New York Supreme Court, County of New York.

FIFTH AVENUE COACH COMPANY, Plaintiff,
against
THE CITY OF NEW YORK, Defendant.

STATE OF NEW YORK,
County of New York, ss:

J. H. McCooey, Deputy Comptroller of The City of New York, and an officer of the Defendant in the above-entitled action, being duly sworn, says: That the foregoing answer is true to his knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to

13 be true. Deponent further says that the reason why this verification is not made by the defendant is that it is a corporation; that this deponent is an officer of the same, to-wit: Deputy Comptroller, and that the grounds of his belief as to all matters not therein stated upon his knowledge are as follows: Information obtained from the books and records of the Department of Finance or other departments of the city government, or from statements made to him by certain officers or agents of the Defendant.

J. H. McCOOEY.

Sworn to before me this 9th day of Sept., 1907.
HARVEY B. DENISON,
Commissioner of Deeds, City of New York, N. Y.

New York Supreme Court.

FIFTH AVENUE COACH COMPANY, Plaintiff,
against
THE CITY OF NEW YORK, Defendant.

Decision.

The issues joined in this action having been duly tried before me on the 17th and 18th days of December, 1907, I do hereby make the following

4 *Findings of Facts.*

First. The plaintiff is a domestic corporation organized the 25th lay of July, 1896, under Article I of Chapter 564 of the Laws of 890.

Second. The defendant is a domestic municipal corporation or-anized and existing under and by virtue of its ancient charters and he Laws of the State of New York.

Third. The Fifth Avenue Transportation Company (Limited), he predecessor in title of the plaintiff herein, was a corporation ormed under the Laws of the State of New York on or about he 29th day of October, 1885. In its Certificate of Incorporation, he said Fifth Avenue Transportation Company (Limited), de-lared the purposes for which it was formed as follows:

"2. The object for which it is to be formed (including the na-ure of its business), is to carry passengers and property for hire, in ll kinds of vehicles drawn by horses, excepting tram-cars; to es-ablish, maintain and operate stage or wagonette routes for public se in the conveyance of persons and property; to take and convey ersons and property in stages or wagonettes and to provide and run he necessary stages or wagonettes, or both, under its routes for the ublic use, and to receive compensation therefor upon acquiring au-hority to establish, maintain and operate such routes; and to keep n livery, and for its own use, and for hire to others to use, horses, arness and all kinds of vehicles drawn by horses, excepting tram-ars; to deal in horses and to manufacture and deal in harness and ll kinds of vehicles drawn by horses, excepting tram-cars, and all kinds of merchandise and commodities pertaining to or in-cidentially connected with or necessary and useful in the business aforesaid or which can be made or dealt in profitably n connection with said business, or any and all of its branches; to urchase, lease, hold, use, sublet, sell and exchange all such real estate nd other property as may be necessary, or convenient for the es-ablishment, maintenance and operation of its business and the rection and maintenance of buildings, and other accommodations, ecessary to fully accomplish the objects of its incorporation, in-luding stables, blacksmith shops, and farrieries, in connection with uch stables, and all necessary and useful buildings fixtures and achinery for the accommodation of its passengers, freight and par-els.

And the locality of its business is in the City of New York and its icinity."

Fourth. By Chapter 536 of the Laws of 1886 of the State of New York, the Fifth Avenue Transportation Company (Limited), was authorized, upon certain conditions therein named, to run and drive or cause to be run and driven, a line of stages or carriages for the transportation of passengers for hire, from 89th Street in the City of New York, as then constituted, down Fifth Avenue, across Wash-ington Park and along South Fifth Avenue to the Bleecker Street elevated station and return.

Fourth [*a*]. Section 1 of said Chapter 536, Laws of 1886, provides as follows:

"SECTION 1. That the Fifth Avenue Transportation Company (Limited), a company organized under the laws of the State of New York, and its assigns, be and they are hereby authorized, on payment of the license fees as hereinafter provided, to run and drive, or cause to be run and driven, and without further authority
16 from said city, a line of stages, or carriages, for the transportation of passengers for hire, from Eighty-ninth Street in the city of New York down Fifth Avenue, across Washington Park, and along South Fifth Avenue to the Bleecker Street Elevated Station and return, provided that the consent thereto in writing of a majority of the owners of the property on the avenue and streets wherein such stages or carriages are hereby authorized shall have been obtained and filed with the Mayor of said city.

Fourth [*b*]. The said Fifth Avenue Transportation Company (Limited), duly filed with the Mayor of the City of New York, as required by said Chapter 536, of the Laws of 1886, the consents in writing of a majority of the owners of the property on the Avenue and Streets and along the route described in said Act to the operation of a line of stages or carriages.

Fourth [*c*]. On or about the 24th day of April, 1889, Chapter 182 of the Laws of New York of 1889 became a law. It was entitled:

"An Act to authorize the Fifth Avenue Transportation Company (Limited), or its assigns to run stages from the Bleecker Street Elevated Railway Station on South Fifth Avenue, in the City of New York, through South Fifth Avenue, Canal and West Streets to the Desbrosses street ferry and return, and also from Fifth Avenue through Thirteenth street, University Place and Ninth street to Broadway and return."

Fifth. On or about the 7th day of February, 1895, in an action brought by the People of the State of New York, plaintiffs, against the Fifth Avenue Transportation Company (Limited), de-
17 fendant in the Supreme Court, it was adjudged and decreed that the Fifth Avenue Transportation Company (Limited), be dissolved, and that Daniel T. Hoag be appointed receiver of all its property, things in action and effects, real and personal.

Sixth. On or about the 11th day of February, 1895, by order duly entered and filed that day in the office of the clerk of the County of New York in a Special Proceeding in the Supreme Court, entitled "In the Matter of Daniel T. Hoag, Receiver of the Fifth Avenue Transportation Company (Limited)," said Receiver was directed to continue running the stage line of said Fifth Avenue Transportation Company (Limited), and its vehicles for hire until the sale of the right to run such stage line should be had or until the further order of the Court in the premises.

Seventh. On or about the 17th day of July, 1895, by order on that day duly filed and entered in the office of the Clerk of New York County, in a Special Proceeding in the Supreme Court, entitled "In the Matter of Daniel T. Hoag, Receiver of the Fifth Avenue Transportation Company (Limited)" it was ordered that all the

rights conferred on the Fifth Avenue Transportation Company (Limited), a dissolved corporation, by said Chapter 536, Laws of 1886 and Chapter 182, Laws of 1889, and also all the other property of said dissolved corporation, be sold at public auction under the direction of said Daniel T. Hoag, Receiver, to the highest bidder as soon thereafter as conveniently might be.

18 *Eighth.* On or about the 30th day of October, 1895, a report of sale by Daniel T. Hoag as Receiver, under said order of July 17th, 1895, was duly filed in said Special Proceeding in the office of the Clerk of the County of New York, showing that all the rights granted by said Chapter 536, Laws of 1886, and said Chapter 182, Laws of 1889, and all the property described in the schedule annexed to the petition for the said order of sale thereof, except the lease therein described, had been on October 17th, 1895, fairly struck off and sold in one parcel to Ward Campbell for $10,250, he being the highest bidder therefor, and that being the highest sum bid for the same. The said Receiver further reported that he had sold to said Ward Campbell the lease mentioned in the schedule of property belonging to said Fifth Avenue Transportation Company (Limited) annexed to the petition for said order of sale, for the sum of $200, he being the highest bidder therefor, and that being the highest sum bid for the same.

Ninth. On or about the 18th day of November, 1895, by an order duly filed and entered that day in the office of the Clerk of the County of New York, in said Special Proceeding, the said report of said Daniel T. Hoag, as Receiver, and the sale of the franchises, rights, powers and privileges of the Fifth Avenue Transportation Company (Limited) to the said Ward Campbell, was in all respects confirmed.

Tenth. On or about the 26th day of November, 1895, the said Daniel T. Hoag, as Receiver as aforesaid, duly executed and delivered a bill of sale of the lease mentioned in said report of

19 sale to said Ward Campbell, which said lease was recorded in Section 5, Book No. 1500 of Conveyances, Liber 40, Page 5, in the office of the Register of the County of New York.

Eleventh. On or about the 26th day of November, 1895, the said Daniel T. Hoag, as Receiver as aforesaid, duly executed and delivered a bill of sale by which he granted, conveyed, sold, assigned and transferred to the said Ward Campbell, all the right to run and drive or cause to be run and driven a line of stages or coaches for the transportation of passengers for hire from Eighty-ninth Street in the City of New York down Fifth Avenue, across Washington Park and along South Fifth Avenue to the Bleecker Street Elevated Station and return, together with all the rights granted to the Fifth Avenue Transportation Company (Limited), or acquired by or under or in pursuance of Chapter 536 of the Laws of 1886, and all the rights granted to or acquired by said Fifth Avenue Transportation Company (Limited), under or by Chapter 182 of the Laws of 1889, together with certain other property therein described.

Twelfth. The Fifth Avenue Coach Company, the plaintiff herein,

is a corporation duly organized and existing under the Laws of the State of New York, having been incorporated in pursuance of the Stock Corporation Law of the State of New York, Chapter 688, Laws of 1892. The Certificate of Incorporation of said Fifth Avenue Coach Company was duly filed and recorded in the office of the Secretary of State of the State of New York on the 25th day of July, 1896, and in the office of the Clerk of the County of New York on the 27th day of July, 1896.

20 *Thirteenth.* Said Fifth Avenue Coach Company was formed and organized for the purpose of taking over the property and franchises of the said Fifth Avenue Transportation Company (Limited), as provided by said Chapter 688, Laws of 1892, and said Ward Campbell was one of the incorporators and signers of said Certificate of Incorporation of said Fifth Avenue Coach Company.

Fourteenth. On or about the 3rd day of November, 1897, the said Ward Campbell, in consideration of the sum of $40,000, duly executed to the Fifth Avenue Coach Company, a bill of sale wherein and whereby he granted, conveyed, sold, assigned, transferred and made over unto the Fifth Avenue Coach Company, the plaintiff herein, all of the rights, licenses, privileges, franchises and property which became vested in him by purchase from Daniel T. Hoag, Receiver as aforesaid, and also all the properties and rights then vested in him whether by said purchase from the said Receiver or by subsequent purchase.

Fifteenth. The Legislature of the State of New York, duly passed an act which became a law April 25, 1900, with the approval of the Governor, being Chapter 657 of the Laws of 1900, entitled:

"An act to amend the Transportation Corporations Law by the addition thereto of a new section in relation to existing routes and extensions."

Sixteenth. In pursuance of said Chapter 657 of the Laws of 1900, the Fifth Avenue Coach Company, the plaintiff herein, made application to the State Board of Railroad Commissioners for a

21 certificate of approval of extension of its routes, which said certificate of approval was duly granted by said Board of Railroad Commissioners on the 2nd day of August, 1900, and filed in the office of the Secretary of State of the State of New York on the 3rd day of August, 1900, and in the office of the Clerk of the County of New York on the 4th day of August, 1900. Said certificate approves the extension or extensions of the route of the Fifth Avenue Coach Company as established by Chapter 536 of the Laws of 1886, upon streets and highways in the Borough of Manhattan, County of New York, as follows:

"From the terminus of its existing route upon Fifth Avenue and East 89th Street; thence along Fifth Avenue to East 120th Street, thence westerly from Fifth Avenue along West 120th Street to Mt. Morris Avenue or Mt. Morris Park West, thence along Mt. Morris Avenue or Mt. Morris Park West, to West 124th Street or Mt. Morris Place, thence along West 124th Street or Mt. Morris Place to Fifth Avenue, thence along Fifth Avenue to East 135th Street; also from

the intersection of Fifth Avenue and West 110th Street westerly along West 110th Street and Cathedral Parkway to Riverside Drive or Avenue; also from the intersection of its existing route at West 57th Street and Fifth Avenue, thence along West 57th Street to Broadway, thence along Broadway, crossing Grand Circle to West 72nd Street, and thence easterly along West 72nd Street to Eighth Avenue or Central Park West; also from Broadway westerly along West 72nd Street to Riverside Drive or Avenue, thence along Riverside Drive or Avenue to West 124th Street."

Seventeenth. On or about the 4th day of August, 1900, the plaintiff herein, duly executed its acceptance of the extension of
22 routes contained in the said certificate of approval of the Board of Railroad Commissioners of the State of New York, dated August 2nd, 1900, and caused the same to be filed in the office of the Secretary of State of the State of New York and in the office of the Clerk of the County of New York on the 4th day of August, 1900.

Eighteenth. On or about the 21st day of February, 1901, on an application duly made to the said Board of Railroad Commissioners by the plaintiff herein, said Board approved said application and granted said extensions of the existing routes of the Fifth Avenue Coach Company, as established by Chapter 536 of the Laws of 1886, and by order of said Board made August 2nd, 1900, upon streets and highways in the Borough of Manhattan, County of New York, as follows:

"From the intersection of its route at Fifth Avenue on East 72nd Street, thence along East 72nd Street to First Avenue; also from its route on 110th Street or Cathedral Parkway at the intersection of Seventh Avenue; thence northerly along Seventh Avenue to 153rd Street; thence along 153rd Street to Macomb's Dam Road; thence along Macomb's Dam Road to the Viaduct at 155th Street; thence along 155th Street to St. Nicholas Place; thence along St. Nicholas Place to St. Nicholas Avenue; thence along St. Nicholas Avenue to Manhattan Avenue; and thence along Manhattan Avenue to 110th Street or Cathedral Parkway; also from the terminus of its route on Riverside Drive or Avenue at West 124th Street; thence northerly along Riverside Drive or Avenue over the new Viaduct to West 135th Street; thence along West 135th Street to Broadway."

23 *Nineteenth.* On the 23rd day of February, 1901, the plaintiff executed an instrument in writing accepting the extension of routes set forth in the Certificate of Approval of the Board of Railroad Commissioners made by said Board on the 21st day of February, 1901, which said acceptance was duly filed on said day in the office of the Secretary of State of the State of New York and in the office of the Clerk of the County of New York.

Twentieth. The stages operated by plaintiff upon said Fifth Avenue were propelled by horse power until July 1907, except that for a year prior thereto, one stage propelled by gasolene was run experimentally and that at other times since 1900, stages mechanically propelled were from time to time experimentally operated.

Twenty-first. In the month of July 1907, plaintiff substituted for

the stages theretofore operated by it upon Fifth Avenue, stages propelled by gasolene power and simultaneously therewith there appeared upon the exterior of said stages certain advertising signs located thereon and of size as follows:

Two signs running along parallel with the sides of the stages a distance of 13 feet, extending from the floor of the upper deck and above the roof of the stages in an upward direction, a distance of two feet seven inches in height.

A sign located on the front portion of the stage, over the hood, standing upright and measuring two feet one inch in height, and running from one side of the stage to the other, a distance of six feet six inches.

24 A sign located over the hood of the back of the stage four feet four inches long by two feet one inch high.

A sign located at the rear of the stage, running along the side and back staircase leading from the body to the roof of the stage, eight feet long and about twenty inches wide.

A sign located under the said staircase measuring two feet four inches square.

A sign located on each riser of the steps leading from the body to the roof of the coach.

Signs on the back of each seat on the roof of each stage two feet in length, which were not visible from the street.

Twenty-second. From July 1907, to September 1907, there were displayed upon the two signs running parallel with the body of the said stages, on either side thereof, the following:

At the extreme end of the sign, near the rear of the stage, a life-sized bust picture of a man with face painted a flesh color or pink, wearing a blue sweater with the letter "C" in white on the breast; the face and figure extending from the bottom of the picture to almost the top of the frame. At the other end of the sign near the front of the stage, a life-sized bust picture of a man with face painted a flesh color or pink, wearing a brown sweater with the letter "B" in white on the breast, the face and figure extending from the bottom of the picture to almost the top of the frame. Between the said two figures appeared the words "Duke's Mixture" in letters running diagonally across from the lower end to the top of the sign,—

25 the first letters of the words "Duke's" and "Mixture" each about one foot six inches in height, and the remaining letters of said words about six or eight inches in height, with the words "for pipe" under the word "Duke's" and the words "for cigarette" under the word "Mixture,"—the letters of the word "for pipe" and "for cigarette" were each three inches in height. To the left of the letter "M" of the word "Mixture" and under the letter "s" in the word "Duke's" was a fac-simile of a package of tobacco in white, with a yellow band encircling it, with the words "Duke's Mixture" in blue letters on the yellow band. The color of the said sign was a dark blue band and the words painted thereon were in white letters.

The other of said signs running parallel with the body of said stages were similar to the one above described, except that the pic-

ture of the persons at either end thereof were different in that they were attired in street costume instead of sweaters; the costume of the one being pictured to represent a light gray material and the other a brown material.

The signs over the hood at the front of all the stages operated during said period were painted a very bright yellow, and the words "Duke's Mixture" and "pipe" and "for cigarette" were painted thereon in dark blue letters. The word "Duke's" ran diagonally across from the lower left-hand corner of the sign to the top of the sign, at about the center thereof, and the word "Mixture" commenced in the centre of the sign under the letter "s" of the word "Duke's" and "Mixture" were from sixteen to eighteen inches high, and the other letters thereof about nine inches high. The words
"for pipe" appeared thereon in letters three inches high in
26 the upper left-hand corner, and the words "for cigarette" appeared thereon in letters three inches high in the lower right-hand corner.

The signs over the hood at the front of all the stages operated during said period were painted a very bright yellow and the words "Duke's Mixture" and "for pipe" and "for cigarette" were painted thereon in dark blue letters. The word "Duke's" ran diagonally across from the lower left-hand corner to the upper end of the sign, at about the centre thereof, and the word "Mixture" commenced in the centre of the line, under the letter "s" of the word "Duke's" and extended diagonally across to the upper right-hand corner thereof. The first letters of the words "Duke's Mixture" were from sixteen to eighteen inches high, and the other letters thereof about nine inches high. The words "for pipe" appeared thereon in letters three inches high in the upper left-hand corner, and the words "for cigarette" appeared thereon in letters three inches high in the lower right-hand corner.

The sign at the rear of all the stages operated during said period running along the side and back staircase leading from the body of the roof of the stage were painted yellow, with the words "Duke's Mixture Smoking Tobacco" painted in large dark blue letters thereon.

The signs under the staircase of all the stages operated during said period were painted a very bright yellow and bore the words "Duke's Mixture Smoking Tobacco" in large letters.

The signs on each riser of the stages leading from the body to the roof of the coach were painted in light blue, with the words
27 "Duke's Mixture" painted in yellow letters and a package of tobacco in white with yellow band appearing thereon.

The signs on the back of each seat of all the stages operated during said period were two feet long, having painted thereon in letters two inches high the words "Duke's Mixture."

Twenty-third. In the month of September, 1907, the advertisements theretofore displayed upon the said advertising signs were changed, and there were substituted for the advertisements theretofore displayed thereon, the following:

Upon the signs running parallel with the sides of the stages, ex-

tending from the floor of the upper deck and above the roof of the stages, each of the following described appeared upon either side of said stages:

A landscape representing trees, rocks, grass and shrubbery in the rear of the picture, and in the foreground railroad tracks. To the right of the picture, running along the tracks, was a locomotive painted light blue and a number of cars attached, representing railroad cars, painted red. To the left of the picture standing by a switch signal there depicted, was the painted picture of a bull in brown and white. About the center of the picture was the representation of a sign in the field, with the words "Genuine Bull Durham Smoking Tobacco" painted in yellow letters on a black background. The bull was about two feet long and about two feet high. The first letters of the words "'Bull' Durham" were each five inches in height; the remaining letters of said words were four inches in height. The word "Genuine" was painted above, and the words "Smoking Tobacco" below the words "'Bull' Durham." A
28 telegraph pole appeared in the right-hand corner of the picture. The predominating color of the picture was green.

Another sign depicted a landscape showing to the extreme left thereof about the fore-quarters of a bull, including his head and shoulders and the front portion of his body, painted in brown and white. A signboard painted black, with the words "Genuine 'Bull' Durham Smoking Tobacco" painted on it in yellow letters appeared in the center of the picture. At the right of the picture was a package of tobacco with a label on it, with the words "Genuine Durham," the picture of a bull and other writing thereon. This package was painted white, with a red band around it and a green band over the top; attached was a white tag bearing a black label, whereon was depicted a bull. The figure of the bull at the left of the picture was three feet eight inches long and two feet high.

Another sign depicted a landscape with a sign-board on the left of the picture, with the words "Genuine 'Bull' Durham Smoking Tobacco" painted thereon in yellow letters. Toward the right of the picture were painted the figures of two bulls in combat; one a slate color or drab figure of a bull, and the other brown and white. The brown and white bull was shown with his horns buried in the flanks of the lighter colored bull. The size of the bull was two feet from head to tail. A black signboard was surmounted by a rim in rose color. In the rear of the picture a body of water was shown, and surrounding the same and in other parts of the picture were trees, grass and fields in green.

Another of said signs depicted a bull to the left of the picture, standing by a stile, with the landscape in the rear showing
29 trees painted green, and a field likewise painted green. The bull on this picture was about two feet long and two feet high. A signboard covered about one-half the picture and was in black, surrounded by a rose colored frame, and had painted thereon the words "Genuine 'Bull' Durham Smoking Tobacco" in large letters, with the words "'Bull' Durham" extending the full length of

the sign, and the word "Genuine" above and the words "Smoking Tobacco" under said words.

Another sign depicted a bull painted red and white standing in the foreground in the center of what appeared to be an arena, and in the distance there was painted a horse lying down with blood flowing from his sides, and the figures of four or five men in different positions in various colors. The representation depicted a bull fight. In the rear of the picture was an auditorium with numerous seats and numerous people sitting therein. To the left of the picture appeared a royal box, surrounded by blue, white, yellow and green flags. The figures of human beings shown in the royal box were of various colors. Along the bottom of this royal box was painted a black sign with the words "Genuine 'Bull' Durham Smoking Tobacco" depicted thereon in bright yellow letters, six or seven inches high.

The sign over the hood of the front of all the stages operated from September to December, 1907, were bright yellow, having painted thereon in dark blue letters the words "Genuine 'Bull' Durham Smoking Tobacco," the letters of the words "'Bull' Durham" extended from side to side across the center of the sign, with the word "Genuine" above and the words "Smoking Tobacco" underneath.

30 The sign over the hood at the rear of the stages operated during the said period was of bright yellow, having painted thereon in dark blue letters the words "Genuine 'Bull' Durham Smoking Tobacco," the letters of the words "'Bull' Durham" extended from side to side across the center of the sign, with the word "Genuine" above and the words "Smoking Tobacco" underneath.

The signs upon the stages operated during such period which ran along the side and back staircase leading from the body to the roof were of bright yellow, with the words "Genuine 'Bull' Durham Smoking Tobacco" shown thereon in dark blue letters.

The sign under the staircase was painted in bright yellow, and had painted thereon in dark blue letters the words "'Bull' Durham Smoking Tobacco."

Upon the riser of each step of the staircase leading from the body to the roof of the coach were the words "'Bull' Durham" painted in white.

Twenty-fourth. Early in the month of December, 1907, the advertisements displayed upon the said advertising signs were changed, and there were substituted for the advertisements theretofore displayed thereon, and there are still displayed thereon, the following:

Upon the signs running parallel with the sides of the stages, extending from the floor of the upper deck and above the roof of the stages, two of the following signs appeared, one on each side of the stage.

A landscape representing a scene in some Eastern country.
31 To the left of the picture is a stone wall painted a dark color, with the words "Helmar Turkish Cigarettes" painted in white letters with black shading around the letters. The size of this wall is about four feet long. The first letter of the word "Helmar"

measures about twelve inches and the last letter about nine inches. The words "Turkish Cigarettes" are in smaller letters underneath the word "Helmar." To the right of the picture are the figures of two pack camels and three men in oriental costume of various colors. Behind the camel near the right of the picture, are columns and to the right thereof, a package of cigarettes with the word "Helmar" near the top, and the words "Turkish Cigarettes" in smaller letters near the bottom thereof. There are many colors upon said picture, including green, dark blue, white, light blue, yellow, drab and various shades of red. Upon it is painted the head and bust of a woman. The size of the package of cigarettes is twenty by sixteen inches.

Another sign depicts a picture of a stone structure resembling a fortress and is painted brown, and on the side of this fortress are the words "Helmar Turkish Cigarettes" painted in white letters, shaded black. In the background is a blue sky, and the ground is yellow and blue in color. In the center of the picture is the figure of a man in Eastern costume with a lighted torch held aloft. In the distance is a camp of four or five tents and a light blazing up from the center thereof. To the extreme right is painted a green package of cigarettes, with yellow appearing on the left side thereof; upon it is painted the head and bust of a woman. The size of the package is twenty by sixteen inches.

32 Another sign depicts a yellow sky in the background which, near the portion representing the road is red. Ruins or stone work occupied a great part of the picture on which is painted a red sign six feet long. Upon this sign are painted the words "Helmar Turkish Cigarettes" in white letters, shaded in black. The letters are about ten inches high. Represented in the picture are a man and camel with the latter in a sitting position; the man in green Turkish costume; the sand or ground part in this picture is yellow.

Another sign depicts a large stone structure with the words "Helmar Turkish Cigarettes' painted on the side thereof. The word "Helmar" is six feet long. Upon the picture is portrayed a stone figure of the sphinx with a figure bearing a package of cigarettes leaning against it. Upon the package is painted the head and bust of a woman; the size of the package is twenty by sixteen inches.

The sign over the hood at the front of all the stages operated since the early part of December, 1907, are bright red, having painted thereon in white letters, shaded black, the words "Helmar Turkish Cigarettes."

The sign over the hood at the rear of all the stages operated since the early part of December, 1907, are bright red, having painted thereon in white letters, shaded black, the words "Helmar Turkish Cigarettes."

The signs upon the stages operated since the early part of December, 1907, which run along the side and back staircase leading from the body to the roof, are of bright red with the words "Helmar Turkish Cigarettes" shown thereon in white letters shaded black.

33 The sign under the staircase on all the stages operated since the early part of December, 1907, are painted a bright yellow and has painted thereon in white letters, shaded black, the words "Helmar Turkish Cigarettes."

Upon the riser of each step of the staircase leading from the body to the roof of the coach are the words "Helmar Turkish Cigarettes."

Twenty-fifth. The stages whereon these advertising signs have been and now are displayed, have two decks. On the lower deck there were and now are longitudinal seats for sixteen passengers, and on the upper deck there were and now are transverse seats for eighteen passengers, and the stairway led and now leads from the rear platform of the lower deck to the upper deck. Around the upper deck a screen was and is constructed. The stairway also had and now has a screen extending from the top to the bottom.

Twenty-sixth. The Fifth Avenue Coach Company, the plaintiff herein, and its predecessors in title, have since the year 1885, continuously maintained and operated a line of stages or omnibuses upon, along and over the route mentioned in Chapter 536, Laws of 1886; and since August 2, 1900, and February 21, 1901, the plaintiff has operated and maintained a line of stages along the extended routes acquired on those dates respectively as hereinbefore stated.

Twenty-seventh. The routes of the plaintiff herein, were prior to 1900, and as then existing, operated with horses, single and double deck omnibuses. The capacity of the largest horse omnibus was 34 passengers with two decks.

34 *Twenty-eighth.* The automobile omnibuses now operated over the routes of the plaintiff herein have two decks, on the lower of which are longitudinal seats for sixteen passengers, and on the upper deck there are transverse seats for eighteen passengers. There is a stairway leading from the rear platform of the lower deck to the upper deck. Said stairway has a screen extending from the top to the bottom.

Twenty-ninth. The space used for advertising purposes on the vehicles of the plaintiff herein, is leased to the Railway Advertising Company, under an agreement dated May 11, 1907, from which the plaintiff herein receives the sum of $10,000 per annum, plus the sum of $200 per bus for exterior advertising. There was an agreement dated May 15, 1905, relating to interior advertising.

Thirtieth. Advertising signs in various colors visible from the sidewalk, are now and have been for twenty years last past displayed and maintained on the stairs of the elevated railway companies which stand in the streets of the City of New York. Said advertisements extend from the top to the bottom of said stairways, on the back thereof and also on the risers of the steps. Large signs are also displayed at the foot of the staircases. Soaps, tobacco, theatrical performances, etc., are advertised. Advertising signs are also displayed on the elevated structures in the City of New York, which extend along the inside of the railings of the station platforms and on the risers of the plaforms adjoining the tracks, and are visible in some

cases from the street. Upwards of 775,000 people use the ele-
35 vated railways and their respective stations daily.

Thirty-first. Advertising signs are displayed on the walls of the underground stations of the Subway Railroad Company, some of which are six feet in height, with miscellaneous advertising thereon, such as soaps, tobacco, theatrical performances and patent medicines. The pictures used to ornament such advertisements on the walls of the subway are of various kinds.

Thirty-second. The advertising signs displayed on the stages of the Fifth Avenue Coach Company, the plaintiff herein, have no relation to the physical comfort, safety, health or convenience of the passengers or public, or the operation of the stages.

Thirty-third. That from 1850 to 1864 an advertising flag was displayed on each stage of a line of stages operated on Grand Street in the then City of New York; there were also smaller advertising signs displayed thereon, calling attention to places of amusements and dry goods stores along the route or which could be reached by the stages.

Thirty-fourth. That upon some horse propelled cars in the City of New York there are now displayed at the front and rear thereof small advertising flags, and upon a few of the trolley cars small signs of ball games and points that can be reached thereby are displayed on the dashboards.

Thirty-fifth. That prior to July, 1907, there were displayed upon the stages operated by plaintiff on Fifth Avenue, signs not
36 exceeding four in number at any one time and of dimensions not larger than one foot by two feet, advertising places of amusements which could be reached by travel in the stages, but at no time prior to July, 1907, were there displayed signs advertising particular brands of goods entirely disconnected with the business of transportation carried on by the plaintiff.

Thirty-sixth. That no advertising signs were displayed prior to July, 1907, upon the stages operated by the plaintiff which extended the entire length of the body of the stages, nor upon the stairway, nor upon the risers of the steps of said stairway, nor over the hood at the front of the stage, nor over the hood at the rear of the stage.

Thirty-seventh. That no advertising signs similar to those displayed by plaintiff on the exterior of its stages have ever been used upon street cars, elevated cars, nor upon cars operated in the underground railroad in the Borough of Manhattan.

Thirty-eighth. Fifth Avenue from Washington Square to Twelfth street is devoted almost exclusively to residential purposes; Fifth avenue from Twelfth street to Forty-eighth street is devoted mostly to business of high class, and the business buildings erected there and in course of erection, are of fine architectural appearance and of high class; Fifth avenue from Forty-eighth street to Fifty-ninth street is devoted to the highest class of church, residence and club purposes, and upon Fifth avenue north from Fifty-ninth
37 street to Ninetieth street every building, with perhaps one or two exceptions, is a private residence of the highest class.

Thirty-ninth. The character of the neighborhoods in which the elevated trains run is entirely different from that through which the

stages of the plaintiff are operated, running through the poorer sections of the city, and the business carried on along their routes being of an entirely different calibre; the buildings used for residence purposes along the routes of the elevated railroads are tenement houses.

Fortieth. There is advertising matter of various kinds displayed in stores on Fifth avenue, advertising the goods for sale therein.

Forty-first. Newsboys sell newspapers containing advertisements on Fifth avenue. The legal rate of speed in the Borough of Manhattan is eight miles, and the stages operated by plaintiff on Fifth avenue travelled at that rate; the stages operated by plaintiff prior to July, 1907, proceeded at the rate of six miles per hour.

Forty-second. The advertising signs on the exterior of plaintiff's stages are not visible to the passengers carried therein and thereon, but are visible to persons living on, driving, riding and walking on Fifth avenue, and above Fifty-ninth street are also visible to persons in Central Park. The signs over the hoods at the front and rear of the stages are visible for a half mile.

Forty-third. The stages of plaintiff have been operated at
38 frequent intervals on Fifth avenue from Washington Square to Nineteenth street and return, every day since July, 1907, carrying the advertisements hereinbefore described.

Forty-fourth. On the 6th day of June, 1882, the Board of Aldermen of the City of New York, as then constituted, adopted, and on the 19th day of June, 1882, the Mayor of the City of New York approved an ordinance, which reads as follows:

"SECTION 1. That no advertising trucks, vans or wagons shall be allowed in the streets of the City of New York under penalty of $10 for each offense.

"SECTION 2. Nothing herein contained shall prevent the putting of business notices upon ordinary business wagons so long as such wagons are engaged in the usual business or regular work of the owner and not used merely or mainly for advertising.

SECTION 3. All ordinances or resolutions, or parts thereof, inconsistent or conflicting with the provisions of these ordinances are hereby appealed.

SECTION 4. This ordinance shall take effect on the 1st day of July, 1882."

That said ordinance continued in force until the approval by the Mayor on the 15th day of March, 1897, of the ordinance adopted by the Board of Aldermen of the City of New York on the 9th day of March, 1897, which reads as follows:

"SECTION 669. No advertising trucks, vans or wagons shall be allowed in the City of New York under a penalty of $10 for each offense.

39 SECTION 670. Nothing herein contained shall prevent the putting of business notices upon business wagons so long as such wagons are engaged in the usual business or regular work of the owner and not used merely or mainly for advertising."

Said ordinance continued in force until the approval by the Mayor on the 5th day of November, 1906, of the Code of Ordinances adopted

by the Board of Aldermen on the 30th day of October, 1906, which reads as follows:

"SECTION 41. No advertising trucks, vans or wagons shall be allowed in the streets of the Borough of Manhattan under a penalty of $10 for each offense. Nothing herein contained shall prevent the putting of business notices upon ordinary business wagons so long as such wagons are engaged in the usual business or work of the owner and not used merely or mainly for advertising."

Forty-fifth. The plaintiff is not authorized, either by its charter or by law to display advertising signs on the exterior of its stages.

Forty-sixth. The use of the exterior of the stages for advertising purposes is not a stage use; it is not in furtherance of the corporate objects; it is not necessary to the performance of any corporate duty; it is not an element in the consummation of any purpose for which the corporation was formed; it is a distinct and separate enterprise unrelated to the duties and objects of the plaintiff as a common carrier.

Forty-seventh. The defendant, through its various officials and officers, has interfered with and threatens to continue to so interfere with and to prevent the use of signs on the exterior space upon the stages operated by the plaintiff herein for the display of advertising matter and to cause the removal of said advertising matter.

And therefrom I draw the following:

Conclusions of Law.

First. The advertisements in question are not a nuisance.

Second. The advertisements in question cannot be judicially condemned on æsthetic grounds.

Third. The plaintiff's franchise to transport passengers having been granted directly by the legislature, the plaintiff cannot be deprived of rights incidental to such franchise by the City.

Fourth. The health, physical comfort, safety and morals of passengers and of the public are not injured by the display of the exterior advertisements which have appeared on the plaintiff's stages.

Fifth. That plaintiff has failed to establish that the display of advertising signs upon the exterior of its stages operated upon Fifth Avenue is necessarily incident to the operation thereof.

Sixth. That plaintiff has failed to prove that it is customary in the Borough of Manhattan, City of New York, to operate stages with advertisments displayed on the outside thereof as has been done by the plaintiff herein since July, 1907.

Seventh. That plaintiff has failed to prove that advertising signs, such as have been and now are displayed by plaintiff upon the stages operated on Fifth Avenue, are operated in neighborhoods of a similar character in the City of New York.

Eighth. That by its franchise plaintiff did not secure the right to display advertisements for hire upon the outside of its stages.

Ninth. That the display by plaintiff of advertising signs upon the exterior of its stages for remuneration is *ultra vires.*

Tenth. That the streets of the City of New York can be used only for municipal or street purposes, and the display of advertising signs upon the exterior of the stages operated by plaintiff on Fifth Avenue is neither a municipal nor street purpose.

Eleventh. The right to utilize the exterior of the plaintiff's stages for advertising purposes is neither incidental to nor implied by the powers conferred by the plaintiff's charter or by law.

Twelfth. That defendant is entitled to judgment dismissing the complaint of the plaintiff upon the merits, together with the costs of this action, and I direct that judgment be entered accordingly.

Dated New York, January 22, 1908.

DAVID LEVENTRITT,
Justice of the Supreme Court.

42 Supreme Court, New York County.

FIFTH AVENUE COACH COMPANY, Plaintiff,
against
THE CITY OF NEW YORK, Defendant.

Plaintiff's Proposed Findings.

Before Hon. David Leventritt.

The Fifth Avenue Coach Company, the plaintiff herein, hereby requests that the following findings of fact and conclusions of law be made and incorporated in the decision and judgment herein.

Findings of Fact.

(1.) The Fifth Avenue Transportation Company (Limited), the predecessor in title of the plaintiff herein, was a corporation formed under the Laws of New York on or about the 29th day of October, 1885.

(Found. D. L., J.)

(2.) In its Certificate of Incorporation, the said Fifth Avenue Transportation Company (Limited) declared the purposes for which it was formed as follows:

"2. The object for which it is to be formed (including the nature of its business), is to carry passengers and property for hire,
43 in all kinds of vehicles drawn by horses, excepting tram-cars; to establish, maintain and operate stage or wagonette routes for public use in the conveyance of persons and property; to take and convey persons and property in stages or wagonettes, and to provide and run the necessary stages or wagonettes, or both, under its routes for the public use, or both, and to receive compensation therefor upon acquiring authority to establish, maintain and operate such routes; and to keep on livery, and for its own use, and for hire to others to use, horses, harness and all kinds of vehicles drawn by horses, excepting tram-cars; to deal in horses and to manufacture and deal in harness and all kinds of vehicles drawn by horses,

excepting tram-cars, and all kinds of merchandise and commodities pertaining to or incidentally connected with or necessary and useful in the business aforesaid, or which can be made or dealt in profitably in connection with said business, or any and all of its branches; to purchase, lease, hold, use, sublet, sell and exchange all such real estate and other property as may be necessary or convenient for the establishment, maintenance and operation of its business and the erection and maintenance of buildings and other accommodations, necessary to fully accomplish the objects of its incorporation, including stables, blacksmith shops, and farrieries in connection with such stables, and all necessary and useful buildings, fixtures and machinery for the accommodation of its passengers, freight and parcels.

And the locality of its business is in the City of New York and its vicinity."

(Found. D. L., J.)

(3.) On or about the 2nd day of June, 1886, Chapter 536, Laws of New York of 1886, became a law. The Act was entitled:

"An act to Authorize the Fifth Avenue Transportation
44 Company (Limited), or its assigns, to run stages on Fifth Avenue through Washington Park, and through South Fifth Avenue to the Bleecker Street Elevated Railway Station in the City of New York and return."

(Refused as already found, D. L., J.)

(4.) Section 1 of said Chapter 536, Laws of 1886, provides as follows:

"SECTION 1. That the Fifth Avenue Transportation Company (Limited), a company organized under the laws of the State of New York, and its assigns, be and they are hereby authorized, on payment of the license fees as hereinafter provided, to run and drive, or cause to be run and driven, and without further authority from said city a line of stages or carriages, for the transportation of passengers for hire, from Eighty-ninth Street in the city of New York down Fifth Avenue, across Washington Park; and along South Fifth Avenue to the Bleecker Street Elevated Station and return, provided that the consent thereto in writing of a majority of the owners of the property on the avenue and streets wherein such stages or carriages are hereby authorized shall have been obtained and filed with the Mayor of said city."

(Found. D. L., J.)

(5.) The said Fifth Avenue Transportation Company (Limited), duly filed with the Mayor of the City of New York, as required by said Chapter 536, of the Laws of 1886, the consents in writing of a majority of the owners of the property on the Avenue and Streets and along the route described in said Act to the operation of a line of stages or carriages.

(Found. D. L., J.)

45 (6.) On or about the 24th day of April, 1889, Chapter 182 of the Laws of New York of 1889 became a law. It was entitled:

"An Act authorizing the Fifth Avenue Transportation Company (Limited), or its assigns, to run stages from the Bleecker Street

Elevated Railway Station on South Fifth Avenue, in the City of New York, through South Fifth Avenue, Canal and West Streets to the Desbrosses Street ferry and return, and also from Fifth Avenue through Thirteenth Street, University Place and Ninth Street to Broadway and return."

(Found. D. L., J.)

(7.) On or about the 7th day of February, 1895, in an action brought by the People of the State of New York, plaintiffs, against the Fifth Avenue Transportation Company (Limited), defendant, in the Supreme Court, it was adjudged and decreed that the Fifth Avenue Transportation Company (Limited), be dissolved, and that Daniel T. Hoag be appointed receiver of all its property, things in action and effects, real and personal.

(Found. D. L., J.)

(8.) On or about the 11th day of February, 1895, by order duly entered and filed that day in the office of the Clerk of the County of New York in a Special Proceeding in the Supreme Court, entitled, "In the Matter of Daniel T. Hoag, Receiver of the Fifth Avenue Transportation Company (Limited)," said receiver was directed to continue running the stage line of said Fifth Avenue Transportation Company (Limited), and its vehicles for hire until the
46 sale of the right to run such stage line should be had or until the further order of the court in the premises.

(Found. D. L., J.)

(9) On or about the 17th day of July, 1895, by order on that day duly filed and entered in the office of the Clerk of New York County, in a Special Proceeding in the Supreme Court, entitled "In the Matter of Daniel T. Hoag, Receiver of the Fifth Avenue Transportation Company (Limited)" it was ordered that all the rights conferred on the Fifth Avenue Transportation Company (Limited), a dissolved corporation, by said Chapter 536, Laws of 1886, and Chapter 182, Laws of 1889, and also all the other property of said dissolved corporation, be sold at public auction under the direction of said Daniel T. Hoag, Receiver, to the highest bidder as soon thereafter as conveniently might be.

(Found. D. L., J.)

(10) On or about the 30th day of October, 1895, a report of sale by Daniel T. Hoag as Receiver, under said order of July 17, 1895, was duly filed in said Special Proceeding in the office of the Clerk of the County of New York, showing that all the rights granted by said Chapter 536, Laws of 1886, and said Chapter 182, Laws of 1889, and all the property described in the schedule annexed to the petition for the said order of sale thereof, except the lease therein described, had been on October 17, 1895, fairly struck off and sold in one parcel to Ward Campbell for $10,250, he being the highest bidder therefor, and that being the highest sum bid for the same.
47 The said receiver further reported that he had sold to said Ward Campbell the lease mentioned in the Schedule of property belonging to said Fifth Avenue Transportation Company (Limited) annexed to the petition for said order of sale, for the

sum of $200, he being the highest bidder therefor, and that being the highest sum bid for the same.

(Found. D. L., J.)

(11) On or about the 18th day of November, 1895, by an order duly filed and entered that day in the office of the Clerk of the County of New York, in said Special Proceeding, the said report of Daniel T. Hoag, as Receiver, and the sale of the franchises, rights, powers and privileges of the Fifth Avenue Transportation Company (Limited), to the said Ward Campbell, was in all respects confirmed.

(Found. D. L., J.)

(12) On or about the 26th day of November, 1895, the said Daniel T. Hoag, as Receiver as aforesaid, duly executed and delivered a bill of sale of the lease mentioned in said report of sale to said Ward Campbell, which said lease was recorded in Section 5, Book No. 1500 of Conveyances, Liber 40, page 5, in the office of the Register of the County of New York.

(Found. D. L., J.)

(13) On or about the 26th day of November, 1895, the said Daniel T. Hoag, as Receiver as aforesaid, duly executed and delivered a bill of sale by which he granted, conveyed, sold, as-
48 signed and transferred to the said Ward Campbell, all the right to run and drive or cause to be run and driven a line of stages or coaches for the transportation of passengers for hire from Eighty-ninth street in the City of New York down Fifth avenue, across Washington Park and along South Fifth avenue to the Bleecker Street Elevated Station and return, together with all the rights granted to the Fifth Avenue Transportation Company (Limited), or acquired by or under or in pursuance of Chapter 536 of the Laws of 1886, and all the rights granted to or acquired by said Fifth Avenue Transportation Company (Limited), under or by Chapter 182 of the Laws of 1889, together with certain other property therein described.

(Found. D. L., J.)

(14) The Fifth Avenue Coach Company, the plaintiff herein, is a corporation duly organized and existing under the Laws of the State of New York, having been incorporated in pursuance of the Stock Corporation Law of the State of New York, Chapter 688, Laws of 1892. The Certificate of Incorporation of said Fifth Avenue Coach Company was duly filed and recorded in the office of the Secretary of State of the State of New York on the 25th day of July, 1896, and in the office of the Clerk of the County of New York on the 27th day of July, 1896.

(Found. D. L., J.)

(15) Said Fifth Avenue Coach Company was formed and organized for the purpose of taking over the property and
49 franchises of the said Fifth Avenue Transportation Company (Limited), as provided by said Chapter 688, Laws of 1892, and said Ward Campbell was one of the incorporators and signers of said certificate of incorporation of said Fifth Avenue Coach Company.

(Found. D. L., J.)

(16) On or about the 3rd day of November, 1897, the said Ward Campbell, in consideration of the sum of $40,000 duly executed to the Fifth Avenue Coach Company a bill of sale wherein and whereby he granted, conveyed, sold, assigned, transferred and made over unto the Fifth Avenue Coach Company, the plaintiff herein, all of the rights, licenses, privileges, franchises and property which became vested in him by purchase from Daniel T. Hoag, Receiver as aforesaid, and also all the properties and rights then vested in him whether by said purchase from the said receiver or by subsequent purchase.

(Found. D. L., J.)

(17) The Legislature of the State of New York, duly passed an act which became a law April 25, 1900, with the approval of the Governor, being Chapter 657 of the Laws of 1900, entitled

"An Act to amend the Transportation Corporations Law by the addition thereto of a new section in relation to existing routes and extensions."

(Found. D. L., J.)

(18) In pursuance of said Chapter 657 of the Laws of
50 1900, the Fifth Avenue Coach Company, the plaintiff herein, made application to the State Board of Railroad Commissioners for a certificate of approval of extension of its routes, which said certificate of approval was duly granted by said Board of Railroad Commissioners on the 2nd day of August, 1900, and filed in the office of the Secretary of State of the State of New York on the 3rd day of August, 1900, and in the office of the Clerk of the County of New York on the 4th day of August 1900. Said certificate approves the extension or extensions of the route of the Fifth Avenue Coach Company as established by Chapter 536 of the Laws of 1886, upon streets and highways in the Borough of Manhattan, County of New York, as follows:

"From the terminus of its existing route upon Fifth avenue at East 89th street; thence along Fifth avenue to East 120th street; thence westerly from Fifth avenue along West 120th street to Mt. Morris avenue or Mt. Morris Park West; thence along Mt. Morris avenue or Mt. Morris Park West to West 124th street or Mt. Morris place; thence along West 124th street or Mt. Morris place to Fifth avenue; thence along Fifth avenue to East 135th street; also from the intersection of Fifth avenue and West 110th street westerly along West 110th street and Cathedral Parkway to Riverside Drive or avenue; also from the intersection of its existing route at West 57th street and Fifth avenue; thence along West 57th street to Broadway; thence along Broadway crossing Grand Circle to West 72nd street; and thence easterly along West 72nd street to Eighth avenue or Central Park West; also from Broadway westerly along West 72nd street to Riverside Drive or avenue; thence along Riverside Drive or avenue to West 124th street."

(Found. D. L., J.)

51 (19) On or about the 4th day of August, 1900, the plaintiff herein duly executed its acceptance of the extension of routes contained in the said certificate of approval of the Board of

Railroad Commissioners of the State of New York, dated August 2nd, 1900, and caused the same to be filed in the office of the Secretary of State of the State of New York and in the office of the Clerk of the County of New York on the 4th day of August, 1900.

(Found. D. L., J.)

(20) On or about the 21st day of February, 1901, on an application duly made to the said Board of Railroad Commissioners by the plaintiff herein, said Board approved said application and granted said extensions of the existing routes of the Fifth Avenue Coach Company, as established by Chapter 536 of the Laws of 1886, and by order of said Board made August 2nd, 1900, upon streets and highways in the Borough of Manhattan, County of New York, as follows:

"From the intersection of its route at Fifth avenue on East 72nd street; thence along East 72nd street to First avenue; also from its route on 110th street or Cathedral Parkway at the intersection of Seventh avenue; thence northerly along Seventh avenue to 153rd street; thence along 153rd street to Macomb's Dam Road; thence along Macomb's Dam Road to the viaduct of 155th street; thence along 155th street to St. Nicholas place; thence along St. Nicholas place to St. Nicholas avenue; thence along St. Nicholas avenue to Manhattan avenue; and thence along Manhattan avenue to 110th street or Cathedral Parkway; also from the terminus of its route on Riverside Drive or avenue at West 124th street; thence
52 northerly along Riverside Drive or avenue over the new viaduct to West 135th street; thence along West 135th street to Broadway."

(Found. D. L., J.)

(21) On the 23rd day of February, 1901, the plaintiff executed an instrument of writing accepting the extension of routes set forth in the Certificate of Approval of the Board of Railroad Commissioners made by said Board on the 21st day of February, 1901, which said acceptance was duly filed on said day in the office of the Secretary of State of the State of New York and in the office of the Clerk of the County of New York.

(Found. D. L., J.)

(22) The Fifth Avenue Coach Company, the plaintiff herein, and its predecessors in title, have since the year 1886 continuously maintained and operated a line of stages or omnibuses upon, along and over the route mentioned in Chapter 536, Laws of 1886; and since August 2, 1900, and February 21, 1901, the plaintiff has operated and maintained a line of stages along the extended routes acquired on those dates respectively as hereinbefore stated.

(Found. D. L., J.)

(23) The routes of the plaintiff herein, were prior to 1900, and as then existing, operated with horses, single and double deck omnibuses. The capacity of the largest horse omnibus was 34 passengers with two decks.

(Found. D. L., J.)

53 (24) The automobile omnibuses now operated over the routes of the plaintiff herein have two decks, on the lower of

which are longitudinal seats for sixteen passengers, and on the upper deck there are transverse seats for eighteen passengers. There is a stairway leading from the rear platform of the lower deck to the upper deck. Said stairway has a screen extending from the top to the bottom.

(Found as modified. D. L., J.)

(25) The space used for advertising purposes, on the vehicles of the plaintiff herein, is leased to the Railway Advertising Company, under an agreement dated May 11, 1907, from which the plaintiff herein receives the sum of $10,000 per annum, plus the sum of $200 per bus for exterior advertising. *There was an* agreement dated May 15, 1905, *relating to interior advertising.*

(Found as modified. D. L., J.)

(26) Advertising signs in various colors visible from the sidewalk, are now and have been for twenty years last past displayed and maintained on the stairs of the elevated railway companies, which stand in the streets of the City of New York. Said advertisements extend from the top to the bottom of said stairways, on the back thereof and also on the risers of the steps. Large signs
54 are also displayed at the foot of the staircases. Soaps, tobacco, theatrical performances, etc., are advertised.

(Found as modified. D. L., J.)

(27) Advertising signs are also displayed on the elevated structures in the City of New York, which extend along the *inside of the* railings of the station platforms and on the rises of the platforms adjoining the tracks, and are visible in *some* cases from the street. Upwards of 775,000 people use the elevated railways and their respective stations daily.

(Found as modified. D. L., J.)

(28) Advertising signs are displayed on the walls of the underground stations of the Subway Railroad Company, some of which are six feet in height, with miscellaneous advertising thereon, such as soaps, tobacco, theatrical performances and patent medicines. The pictures used to ornament such advertisements on the walls of the Subway are of various kinds.

(Found. D. L., J.)

(29) The advertising signs displayed on the stages of the Fifth Avenue Coach Company, the plaintiff herein, *have no relation to* the physical comfort, safety, health or convenience of the passengers or public, or the operation of the stages.

(Found as modified. D. L., J.)

(30) The display of advertisements on the exterior of the
55 stages, which are the private property of the plaintiff, is merely an incident to the use of the said stages in the operation of the franchise for the transportation of passengers for hire belonging to it.

(Refused. D. L., J.)

(31) The defendant, through its various officials and officers, has interfered with and threatens to continue to so interfere with and to prevent the use of *signs on the* exterior space upon the stages

operated by the plaintiff herein for the display of advertising matter and to cause the removal of said advertising matter.

(Found as modified. D. L., J.)

(32) Fifth Avenue in the City of New York, between Twelfth and Forty-eighth streets is mostly devoted to business, and goods of various kinds, including tobaccos, are displayed in the windows of the stores. A progressive change from residential to business purposes on Fifth Avenue below 59th street has been going on for a long time, and at 90th street there is a restaurant and fruit stand.

(Refused except as found. D. L., J.)

(33) Newspapers are sold on Fifth avenue in the City of New York by newsboys in the streets which contain advertisements similar, except in size and color, to those displayed on the stages of the Fifth Avenue Coach Company, the plaintiff herein.

(Refused. D. L., J.)

56 (34) The stages which operated along Grand, Broadway and Canal streets in the City of New York from 1850 down to the time when they were superseded by horse cars carried flags and signs on the tops and exterior sides thereof, advertising theatres and goods.

(Refused, as already found. D. L., J.)

(35) Advertising signs have been to some extent, continuously carried on the exterior and tops of horse drawn street cars in the Borough of Manhattan, City of New York, for many years. Flags two feet square on top of each end of the car displaying advertisements of Ehrich Brothers, Starin, Glen Island, Carbona Cleaning Fluid, etc., have been displayed thereon. Advertising signs of dry goods houses, skating rinks and baseball games, three feet in width and two and one-half feet in height, have also appeared on the dashboards of street cars, being placed there by advertising people for compensation.

(Refused, except as found. D. L., J.)

(36) Plaintiff will be irreparably injured unless equitable relief is granted.

(Refused. D. L., J.)

Conclusions of Law.

(1) The right of the Fifth Avenue Coach Company, the plaintiff herein, to display advertisements on the exterior of its vehicles, is incidental to its right to transport passengers for hire.

(Refused. D. L., J.)

57 (2) The advertisements in question are not a nuisance.

(Found. D. L., J.)

(3) The advertisements in question cannot be judicially condemned on æsthetic grounds.

(Found. D. L., J.)

(4) The plaintiff's franchise to transport passengers having been granted directly by the Legislature, the plaintiff cannot be deprived of rights incidental to such franchise by the City.

(Found. D. L., J.)

(5) The health, physical comfort, safety and morals of passengers and of the public are not injured by the display of the exterior advertisements which have appeared on the plaintiff's stages.

(Found. D. L., J.)

(6) The threatened action of the City of New York, the defendant herein, is not a lawful exercise of "Police power."

(Refused. D. L., J.)

(7) The ordinance prohibiting advertising trucks, vans or wagons from using the streets of the Borough of Manhattan has no application to the Fifth Avenue Coach Company, the plaintiff herein.

(Refused. D. L., J.)

58 (8) Any law or ordinance which prevents the Fifth Avenue Coach Company, the plaintiff herein, from displaying advertisements on the exterior of its vehicles, will deprive it of its property without due process of law.

(Refused. D. L., J.)

(9) Any law or ordinance which prevents the Fifth Avenue Coach Company, the plaintiff herein, from displaying advertisements on the exterior of its vehicles will contravene the Constitution of the United States, and will also deprive the plaintiff herein of the equal protection of the laws within the meaning of the Fourteenth Amendment.

(Refused. D. L., J.)

(10) Any law or ordinance which prevents the Fifth Avenue Coach Company, the plaintiff herein, from displaying advertisements on the exterior of its vehicles, will impair the obligation of the plaintiff's contracts with the Railway Advertising Company, as well as of its contract with the State.

(Refused. D. L., J.)

(11) The plaintiff should have judgment, restraining the defendant from interfering with the advertisements displayed on the exterior of its stages, besides the cost of this action.

(Refused. D. L., J.)

Dated December 27, 1907.

PAGE, CRAWFORD AND TUSKA,
Attorneys for Plaintiff, 32 Liberty Street,
Borough of Manhattan, City of New York.

59 Supreme Court, County of New York.

FIFTH AVENUE COACH COMPANY, Plaintiff,
against
THE CITY OF NEW YORK, Defendant.

Judgment.

The above entitled action having been duly tried before the Hon. David Leventritt at Special Term, Part IV. of this Court, on the 17th and 18th days of December, 1907, upon the issues raised by the complaint and the answer, and the Court having heard the allega-

tions and proofs of the respective parties and due deliberation having been had, and the Court having duly filed its decision in the office of the Clerk of the County of New York directing judgment in favor of the defendant dismissing the complaint upon the merits with costs, and the costs of the defendant having been duly taxed at the sum of $74.57, it is

Ordered, adjudged and decreed that the defendant herein have judgment against the plaintiff, dismissing the complaint herein upon the merits; and it is further

Ordered, adjudged and decreed that the defendant, The City of New York, recover of and from the above-named plaintiff,
60 Fifth Avenue Coach Company, the sum of $74.57, the amount of costs as taxed and that it have execution therefor; and it is further

Ordered, adjudged and decreed that the injunction contained in the order made in the above entitled action on the 30th day of August, 1907, be and the same hereby is in all things vacated and set aside.

Dated, New York, January 25th, 1908.

DAVID LEVENTRITT,
Justice of the Supreme Court.
PETER J. DOOLING, *Clerk.*

Supreme Court, New York County.

FIFTH AVENUE COACH COMPANY, Plaintiff,
against
THE CITY OF NEW YORK, Defendant.

Exceptions to Decision.

SIRS: Please to take notice that the plaintiff herein, saving and reserving all objections to the manner and form of the decis-
61 ion, Findings of Fact and Conclusions of Law of the Court herein, not herein precisely and exactly specified, files the following exceptions to the same:

[1.] The plaintiff specifically excepts to the Court's Second finding of fact so far as it states that defendant is organized or exists under or by virtue of Ancient Charters.

[1½.] Plaintiff specifically excepts to each and every part of the Court's twentieth finding of fact.

[2.] The plaintiff specifically excepts to each and every part of the Court's twenty-first finding of fact.

[3.] Plaintiff specifically excepts to each and every part of the Court's twenty-second finding of fact.

[4.] Plaintiff specifically excepts to each and every part of the Court's twenty-third finding of fact.

[5.] Plaintiff specifically excepts to each and every part of the Court's twenty-fourth finding of fact.

[6.] Plaintiff specifically excepts to the Court's thirty-fifth finding of fact and to each and every part thereof.

[7.] Plaintiff specifically excepts to the Court's thirty-sixth finding of fact, and to every part thereof.

62 [8.] Plaintiff specifically excepts to the Court's thirty-seventh finding of fact, and to every part thereof.

[9.] Plaintiff specifically excepts to the Court's thirty-eighth finding of fact, and to every part thereof.

[10.] Plaintiff specifically excepts to the Court's thirty-ninth finding of fact, and to every part thereof.

[11.] Plaintiff specifically excepts to the Court's forty-second finding of fact, and to every part thereof.

[12.] Plaintiff specifically excepts to the Court's forty-fourth finding of fact, and to every part thereof.

[13.] Plaintiff specifically excepts to the Court's forty-fifth finding of fact, and to every part thereof.

[14.] Plaintiff specifically excepts to the Court's forty-sixth finding of fact, and to every part thereof.

[15.] Plaintiff specifically excepts to the Court's Fifth conclusion of law, and to each and every part thereof.

[16.] Plaintiff specifically excepts to the Court's Sixth conclusion of law, and to every part thereof.

63 [17.] Plaintiff specifically excepts to the Court's Seventh conclusion of law, and to each and every part thereof.

[18.] Plaintiff specifically excepts to the Court's Eighth conclusion of law, and to each and every part thereof.

[19.] Plaintiff specifically excepts to the Court's Ninth conclusion of law, and to each and every part thereof.

[20.] Plaintiff specifically excepts to the Court's Tenth conclusion of law, and to each and every part thereof.

[21.] Plaintiff specifically excepts to the Court's Eleventh conclusion of law, and to each and every part thereof.

[22.] Plaintiff specifically excepts to the Court's Twelfth conclusion of law and to each and every part thereof.

[23.] Plaintiff specifically excepts to the Court's refusal to find the plaintiff's (3), (24), (25), (26), (27), (29), (30), (32), (33), (34), (35) and (36) findings of fact.

[24.] Plaintiff specifically excepts to the Court's refusal to find its First, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh proposed conclusions of law, inclusive, as submitted.

Dated, New York, January 31, 1908.

PAGE, CRAWFORD & TUSKA,
Attorneys for Plaintiff, 32 *Liberty Street*,
Borough of Manhattan, New York City.

64 To Hon. Francis K. Pendleton, Corporation Counsel, Attorney for Defendant, Hall of Records, New York City. Hon. Peter J. Dooling, Clerk of the County of New York.

Case.

This case came on to be tried before the Hon. David Leventritt, Justice, at Special Term, Part IV, of the Supreme Court, New York County, on the 17th and 18th days of December, 1907.

NEW YORK, *December* 17, 1907.

Appearances.

Messrs. Page, Crawford & Tuska, Attorneys for Plaintiff;
William H. Page, Esq., of Counsel.
Francis K. Pendleton, Esq., Corporation Counsel, Attorney for Defendant.
Louis H. Hahlo, Esq., of Counsel.

RICHARD W. MEADE, called as a witness on behalf of the plaintiff, being sworn, testified as follows:

Direct examination by PLAINTIFF'S COUNSEL:

I am the president of the plaintiff company, and have been such since December, 1904. Prior to that time I had been engaged
65 in transportation matters; since 1889. I have been during the whole time a resident of the City of New York, and I am familiar with the construction and the history of the construction of stages and automobiles and the operation of the same in this city.

PLAINTIFF'S COUNSEL: Your Honor, at this point I desire to offer in evidence various papers relating to the Fifth Avenue Coach Company, the plaintiff, and its predecessors in title, and their rights to operate on various routes.

DEFENDANT'S COUNSEL: At this point I ask your Honor to permit it to be spread upon the record that in this action the City does not contest the right of the plaintiff to operate its stages on Fifth avenue, so that the question of the validity of its franchise is not raised here. I want to eliminate that question, the right to operate stages on Fifth avenue, from this case.

The COURT: Does the City concede that this action can be maintained based merely upon the threat on the part of the City to interfere with the advertising on the stages?

PLAINTIFF'S COUNSEL (reading): "It is stipulated between the parties hereto that the defendant through its various officials and officers has threatened and threatens to prevent the use of the exterior space upon the stages operated by the plaintiff for the display of advertising matter, and to cause the removal thereof, and intends so to do until and unless restrained by an order of this Court.

66 The COURT: That will be waived—the question of the right to maintain the action based upon a mere threat, under the stipulation? I so understand, Mr. Hahlo.

DEFENDANT'S COUNSEL: Yes, sir. We want an adjudication on the merits.

The COURT: Very well. Now, you may proceed.

PLAINTIFF'S COUNSEL: I offer in evidence the certificate of incorporation of the Fifth Avenue Transportation Company, Ltd.

Paper admitted and marked Plaintiff's Exhibit A of December 17, 1907.

PLAINTIFF'S COUNSEL: I offer in evidence Chapter 536 of the

aws of 1886, entitled "An Act to Authorize the Fifth Avenue ransportation Company, Ltd., or its Assigns to run stages on Fifth venue, through Washington Park, and through South Fifth avnue, to the Bleecker street elevated railway station in the City of ew York, and return."

Paper admitted and marked Plaintiff's Exhibit B of December 7, 1907.

PLAINTIFF'S COUNSEL: I offer in evidence the consent in writing f a majority of the owners of property on the streets mentioned n the Act, which has just been read in evidence, by reading or inroducing in evidence a certified copy of an abstract from the City ecord in which those consents are set forth, and which said record lso recites that these consents were placed on file with the Mayor.

7 Paper admitted and marked Plaintiff's Exhibit C of December 17, 1907.

PLAINTIFF'S COUNSEL: I offer in evidence Chapter 182 of the aws of 1889, entitled "An Act to Authorize the Fifth Avenue ransportation Company, Limited, or its assigns to run stages from he Bleecker street elevated railway station on South Fifth avenue n the City of New York, through South Fifth avenue, Canal and Vest streets, to the Desbrosses Street Ferry and return; and also rom Fifth avenue through Thirteenth street, University Place and inth street to Broadway and return."

Paper admitted and marked Plaintiff's Exhibit D of December 7, 1907.

PLAINTIFF'S COUNSEL: I offer in evidence an order in an action ntitled "The People of the State of New York against the Fifth venue Transportation Company, Ltd.," made on the 7th of Febuary, 1895, by Judge Ingraham, appointing Mr. Daniel T. Hoag s Receiver of the property, rights and franchises of the Company.

Paper admitted and marked Plaintiff's Exhibit E of December 7, 1907.

PLAINTIFF'S COUNSEL: I offer in evidence an order dated Febuary 11, 1895, by Judge Ingraham, requiring the Receiver to oprate the routes of the Company.

Paper admitted and marked Plaintiff's Exhibit F of December 7, 1907.

PLAINTIFF'S COUNSEL: I offer in evidence an order for the sale by the Receiver, dated July 17, 1895, made by Judge Stover.

8 Paper admitted and marked Plaintiff's Exhibit G of December 17, 1907.

PLAINTIFF'S COUNSEL: I offer in evidence the Receiver's report f sale, filed October 30, 1895—that is, the sale of the property rights nd franchises of the former company.

Paper admitted and marked Plaintiff's Exhibit H of December 7, 1907.

PLAINTIFF'S COUNSEL: I offer in evidence an order confirming he sale by the Receiver, dated November 18, 1895, made by Judge awrence.

Paper admitted and marked Plaintiff's Exhibit I of December 17, 1907.

PLAINTIFF'S COUNSEL: I offer in evidence the bill of sale by the Receiver to Ward Campbell—a bill of sale of a lease affecting the property made by the Receiver to Ward Campbell, dated November 26, 1895.

Paper admitted and marked Plaintiff's Exhibit J of December 17, 1907.

PLAINTIFF'S COUNSEL: I offer in evidence a further bill of sale of the franchises and property made by the Receiver to said Campbell on the same date.

Paper admitted and marked Plaintiff's Exhibit K of December 17, 1907.

PLAINTIFF'S COUNSEL: I offer in evidence the certificate of incorporation of the Fifth Avenue Coach Company, the plaintiff in this case, it being a reorganization certificate, filed July 25, 1895.

Paper admitted and marked Plaintiff's Exhibit L of December 17, 1907.

69 PLAINTIFF'S COUNSEL: I offer in evidence a bill of sale by Ward Campbell to the Fifth Avenue Coach Company, of the rights, privileges and franchises which he acquired by the proceedings heretofore offered in evidence.

Paper admitted and marked Plaintiff's Exhibit M of December 17, 1907.

Witness continues: The routes above referred to of the company, acquired under the Act of 1886, have been operated ever since 1886. They were operated with horse vehicles, principally, single and double decked omnibusses, up to July of this year.

PLAINTIFF'S COUNSEL: I offer in evidence, if your Honor please, Chapter 657 of the Laws of 1900, amending the Transportation Corporations Law, and relating to companies of the character which the plaintiff has been described to be.

Paper admitted and marked Plaintiff's Exhibit N, of December 17, 1907.

PLAINTIFF'S COUNSEL: I offer in evidence certificate of approval of the extension of routes, filed in the Secretary of State's office, August 3, 1900.

Paper admitted and marked Plaintiff's Exhibit O of December 17, 1907.

PLAINTIFF'S COUNSEL: I offer in evidence an acceptance of these extensions, filed August 4, 1900.

Paper admitted and marked Plaintiff's Exhibit P of this date.

PLAINTIFF'S COUNSEL: I offer in evidence a further cer-
70 tificate of approval of extension, dated February 21, 1901, or filed on that date.

Paper admitted and marked Plaintiff's Exhibit Q of this date.

PLAINTIFF'S COUNSEL: I offer in evidence an acceptance of these extensions, filed February 23, 1901.

Paper admitted and marked Plaintiff's Exhibit R of December 17, 1907.

Witness continues: Up to this summer our original routes under the Act of 1886 and under these extensions of 1890 were operated by horse stages. The first operation by automobile stages began about 1900. The operation of our line subsequent to 1900 by automobile stages was largely with experimental busses. The balance of our line was operated by horse busses; the principal operation was by horse omnibusses. The capacity of the largest horse omnibusses was thirty-four passengers, with two decks. The automobile busses which we are now running on our routes have two decks. On the lower deck there are longitudinal seats for sixteen passengers. On the upper deck there are transverse seats for eighteen passengers. There is a stairway leading from the rear platform of the lower deck to the upper deck. Around the upper deck a screen is constructed for the purpose of shielding the persons of the passengers from drafts and from the view of persons on the street. The stairway also has a screen extending from the top to the bottom to screen persons in going from the lower platform to the upper deck.

Q. Well, now, is there any space used for advertising upon
71 these omnibuses which is required for the comfort of the traveling public on these stages?

A. None whatever.

We lease this space to a third party.

Q. What advertising is done or what advertisements are visible on the interior of the coach?

DEFENDANT'S COUNSEL: That is objected to as incompetent, irrelevant and immaterial.

The COURT: I really cannot see the materiality of the advertisements on the inside.

PLAINTIFF'S COUNSEL: Exception.

WITNESS continues: This space is leased to the Railway Advertising Company. We receive from the lease of these advertising privileges $10,000 per annum, plus $200 per annum per bus.

Q. Are you familiar, Mr. Meade, with the extent to which advertisements are displayed in the depots and in the cars and upon the structures of other transportation companies in the City of New York?

A. I am.

DEFENDANT'S COUNSEL: That is objected to as irrelevant, incompetent, and immaterial.

The COURT: I think that is so. I do not think there is sufficient relation between the two situations to justify the application of the custom that prevails in one regard as establishing the custom in the other. In other words, if you show the existence of advertisements inside of ferry houses or inside of cars, I do not think the Court would be justified in inferring that such custom does
72 or should prevail in permitting advertisements to be displayed on the outside of public coaches.

PLAINTIFF'S COUNSEL: Would your Honor's view, as now expressed, cover the exterior signs displayed on the stations of the elevated railways?

The COURT: I think that more nearly approaches the situation with reference to the busses that are here under investigation.

PLAINTIFF'S COUNSEL: Then, Your Honor, you will allow me an exception to the first question?

The COURT: Yes.

WITNESS continues: I am familiar with the elevated railway structures in the streets of the City of New York and the exterior portions of the same.

I am acquainted with the exterior portions of the elevated railway structures and the platforms which extend along the streets and the stairways leading to the streets.

Q. Leading to the streets? Now, will you state whether or not there are any advertising signs on the stairs of the elevated railway structures which stand in the streets and connect the streets with the platform of the structure?

A. There are. They extend from the top to the bottom and are also on the risers of the steps.

These signs advertise anything and everything, such as soaps, tobacco, theatrical performances, and everything. There are advertising signs on the platforms outside of the enclosures of the elevated station structures, and in those parts of the platforms which stand in the streets; these advertisements face the tracks and the houses.

73 They extend along the railings of the station platforms and on the risers of the platforms adjoining the tracks. They are visible from the streets in many cases. This is true of all of the elevated railway stations I know of. Approximately 775,000 people a day use the elevated railway stations. There is advertising on the walls of the underground stations of the subway railway company; miscellaneous advertising attached to the walls.

Some of the panels in the subway which contain advertising are six feet high. They advertise miscellaneous things such as soaps, tobacco and theatrical performances and patent medicines. There are pictures of various kinds used to ornament those various advertisements. These patterns of automobiles such as we use now have been in existence since 1899 or 1900, but the automobile was in existence prior to that.

The use of the automobile for transportation purposes was in vogue to some extent prior to 1899. From my experience I am able to testify as an expert with respect to matters which relate to comfort, safety and convenience of passengers riding in vehicles transporting vehicles for hire. There is nothing whatever in those signs which affects the physical comfort, safety or convenience of the passengers.

Cross-examination by DEFENDANT'S COUNSEL:

Fifth avenue from Washington square north to Eighty-eighth street is partially a business and partially a residence street. The part from Washington square to about Twelfth street is not devoted exclusively to residential purposes; not very much of it is devoted to business.

74 From Washington square to Tenth street is not all residential. On Fifth avenue between Washington square and Tenth street there is the hotel which has offices in it. I mean the Brevoort House. I don't recall what kind of offices are in it. I don't know how many offices there are in the Brevoort House. Some of these offices in the Brevoort House I am under the impression are on the Fifth avenue side. It is just my general impression based on having been there. I do not remember the character of business carried on in these offices. Other than this I do not recall any business that is carried on on Fifth Avenue below Twelfth street. Between Twelfth street and Forty-seventh, or Forty-eighth street it is mostly devoted to business of all classes. I believe Tiffany's is on Fifth avenue and Thirty-seventh street. That is a high class business. The Gorham Manufacturing Company is at Thirty-sixth street and Fifth avenue; that is a high class business. I don't know that it is a prevalent idea in the City of New York that Fifth avenue is the abode of the highest class of business carried on in the City of New York. Some of the highest class businesses carried on in the City of New York are conducted on Fifth avenue. B. Altman & Company are on Fifth avenue, between Thirty-fourth and Thirty-fifth streets. Not all the improvements on Fifth avenue in the section just mentioned are of a high order. The business buildings going up there are not all of fine architectural appearance. I have a general impression that probably a great proportion of them are. That general impression is that the character of the business buildings being erected there is of a high

75 class. From Forty-eighth street up to Eighty-eighth street the character of the buildings on that avenue generally is of a high class, and from Forty-eighth street north, is principally devoted to the purposes of residence. There are quite a few churches between Forty-eighth street and Fifty-ninth street, and some clubs. I would say that from Forty-eighth street to Fifty-ninth street is a section devoted to the highest class of residence, club and church purposes. From Fifty-ninth street north to Eighty-eighth street the buildings are only on one side.

Every building, north of that, with perhaps one or two exceptions, is devoted to a private residence; a residence of the highest class. The signs on the stages operated on Fifth avenue are visible from the sidewalks and the windows. They are also visible to people walking and driving and riding in Central Park. They are also visible to pedestrians on the avenue. I am familiar with the lines of elevated railway in the City of New York. I have ridden on them frequently; on all of them—Second avenue, Third avenue, Sixth avenue and Ninth avenue. Take the Second avenue railroad; the character of the streets through which it runs is business and residence. It is of a class entirely different to that through which our stage line runs. It runs through the so-called poorer sections of the City. The business carried on there is of an entirely different calibre. The residences erected there are of an entirely different calibre.

Q. They are principally tenement houses?

A. I don't know whether or not they are principally tenement houses.

Q. Well, but you know that there are a great many tenement houses along the line of the Second avenue railway?

A. There are.

76 PLAINTIFF'S COUNSEL: I object to all this as not proper cross-examination, although I have no objection to his proceeding with it, if he makes the witness his own for that purpose.

The COURT: You may proceed. Objection overruled.

PLAINTIFF'S COUNSEL: Exception.

It is practically the same with respect to the territory through which the Third avenue elevated railway runs, but not so much so with respect to the Sixth evenue elevated. To a large extent it is a business thoroughfare. It is not necessarily so with regard to the Ninth avenue elevated line; that is, it does not run principally through a section in which there are small stores and tenement houses. On the line of the Ninth avenue elevated railway there are many high class apartment houses. Those apartment houses were put there both before and after the construction of the elevated railway. I am under the impression there were one or two high class apartments along the line of the Ninth avenue elevated railway before the construction of that line. There are a very large number there now. Exceeding two hundred, at any rate. We first began the display of these advertising signs on the exterior of our busses about 1905. We displayed on the exterior in 1905 advertisements for theatres. The Hippodrome advertisement wasn't the only one we displayed. The size of the advertisements we displayed with regard to these theatres was about one foot by two. The size of those we display on either side now are about fifteen by three; and the size of the ones we display in front are about seven by

77 three. The one we display in the rear is about four by three.

We had four signs on our stages in 1905. They were not of places principally along the route of our stages. They were of places that were within several blocks of the line or route upon which our stages were operated. Within a block or two. That was not done for the purpose of calling attention to the fact that our stages ran within a comparatively short distance of these places of entertainment. These prior signs were affixed upon the upper deck; upon the roof of the stages.

Q. Upon the roof, but not as the present signs are displayed, along the upper portion?

A. No.

These other signs could be removed.

Those signs advertised the Hippodrome, the Garden Theatre; I don't remember any others. Those are the only two I remember.

It is a fact that our stages ran within a comparatively short distance of both those places.

Q. Were any other advertising signs displayed then except those advertising the Garden Theatre and the Hippodrome?

A. Yes.

Q. What others?
A. The New York Times and Luna Park.
Q. What was the size of those advertisements?
A. The same size.
Q. One by two?
A. Something like that.
Luna Park advertised only in the summer.
I don't remember what time of year the Garden Theatre advertised. The Hippodrome was partially advertised in the summer. There were never more than four advertisements at one time.
For a year prior to July 1907, there was an experimental stage used like the ones at present operated on Fifth avenue. We
78 displayed advertisements on that stage, simply the small cards tacked on. The same as I have described upon the old busses. Some of the old stages that were operated by horse power also had seats above for the convenience of passengers, on the roof. A great many of them had. Some of them had benches similar to those now on top of the gasoline automobiles.
We might have, if we had found it to our interest, displayed advertisements along the sides of those stages, and we did to a limited extent along the top of those busses. We only displayed those one by two signs. We found it necessary, on those stages, for the protection of passengers and for preventing people gazing at their persons, to board up the sides as they are now boarded up. Advertisements were displayed on them—only the small cards. It was found necessary to board up the whole of the top of those stages for the comfort and convenience of the passengers riding on the top. We boarded them up ever since they were first introduced. A certain number of them, of the horse drawn stages, were boarded up. Six of them were boarded up. They were the only ones out of about thirty. They were boarded up just like the present stages. There was nothing displayed on them except these one by two advertisements of the Hippodrome and the theatres and the Times. Surrounding the passengers on top there was nothing but a blank space with four little one by two cards on it. They were in colors, red, yellow, blue. They were distinctive colors like the present signs.
Q. Is the advertising that appears on your stages today pursuant to a written contract?
A. It is.

79 DEFENDANT'S COUNSEL: I ask for the production of that contract.
(Papers handed to defendant's counsel.)

These contracts are the contracts entered into between the Fifth avenue Coach Company and the Railway Advertising Company (handing paper). The originals are, I believe, in the possession of Page, Crawford & Tuska.

DEFENDANT'S COUNSEL: I offer the copies in evidence, with the understanding that they are subject to correction. There are two contracts.

Papers admitted and marked Defendant's Exhibits 1 and 2 respectively, of December 17, 1907.

I testified that some of the signs displayed on the elevated railway stations themselves were visible from the street. Some of those on the railings of the station platforms. Along the railings of the station platforms. The reading matter on all those advertisements is all facing the other way, toward the tracks. None of that I know of is displayed outwardly except those on the stairways. Those on the platforms themselves are all with the reading matter or pictures facing the tracks. They are visible from the streets. On the end of the platforms they can be seen from the opposite side of the street. That is possible on any of the existing elevated lines at almost any station. I am not sure, but I think the 33rd street station of the Sixth avenue line. Those signs are visible from points on Sixth avenue, either in the houses or on the street.

80 I don't recall ever being in a house on Sixth avenue to see whether these signs were visible from there.

Q. Were you ever, as a matter of fact, in any house on Sixth avenue in the neighborhood of the 33d street elevated station?

A. I think so.

PLAINTIFF'S COUNSEL: I object to this line of examination.

The COURT: The witness has testified that those signs on the elevated stations, those which face the tracks, are visible from the streets; and now he has a right to cross-examine him on that subject. Objection overruled.

Plaintiff's Counsel excepted.

Q. Isn't that the situation at Thirty-second street only, and isn't that an isolated instance because the stations are not *vis a vis*?

A. I do not think so.

These signs are visible from the buildings on the opposite side of the street.

I doubt whether they are visible at 50th street from the street; or at 42nd street; or at 28th street, or at 23rd street, or at 18th street. I think they are visible from the street at 32nd street. I have a strong impression they are.

Q. And from what part of the street are they visible at 32d street? Now, you have reference to the station on the uptown tracks; that is 32d street. The other station is at 33d street?

A. I am speaking of both stations.

The elevated structure intervenes, partially, I think. I think the signs are visible from 33d street. I don't recall from what portion of the street the advertisements are visible on the platform of

81 the uptown station. I do not think I ever saw them from that side. I am sure I saw them on the uptown side from 33d street and from Sixth avenue. That is a strong impression on my part. When I did see them, they were of such a kind that I could read what was on them. I don't remember what I noticed on those advertisements. I don't remember how long ago it was that I saw them. Possibly as long as a year ago; possibly as long as

two years ago, but I don't think so. Possibly as long as six months ago. I did not go there to prepare myself to testify at this trial. I think it was longer than three months ago; I don't remember when it was; it was at various times in the past three or four years. I just looked up casually and saw them there. They did not especially interest me. It has interested me since that. With respect to these signs on the elevated stations, it did not occur to me that I would have to testify on that question. My counsel did not notify me that I would have to testify with respect to the advertisements appearing on the elevated railroad stations. I think I interjected that myself, that some of those signs were visible from the street. I don't think I had ever told my counsel that.

Redirect examination by PLAINTIFF'S COUNSEL:

These rooms in the Brevoort House on Fifth avenue which I referred to as offices and which I stated I did not know exactly what they were used for, were used for business purposes. There is a progressive change on Fifth avenue from residential to business purposes in the uses made of property.

82 The automobile in requiring a guard around the upper deck requires it for additional reasons to the reasons which make it necessary when operated by horses. It is probably more necessary with respect to automobile omnibusses, because of the greater speed. I am familiar with the elevated railway tracks on the Bowery. There is a very wide space between them south of Eighth street. That wide space continues to exist until Canal street, where the third track begins, about that point. In those cases you can see the signs from the street which are on the railing of the stations. I had not recalled this before. And on Ninth avenue, at some places, the tracks are on different sides of the street and there is no third track between them. In cases where there is no third track it is possible, I am quite sure, to see advertisements on the platforms of the stations from the street. I am familiar with what is found in the stores on Fifth avenue. There is advertising matter displayed in them of various and every kind. There are cigar stores on Fifth avenue. They advertise their goods, such as various classes of tobacco. There are newsboys selling newspapers around there on Fifth avenue. These newsboys sell newspapers containing advertisements advertising similar articles to those advertised on the stages but not in colors.

Recross-examination by DEFENDANT'S COUNSEL:

Q. What is the legal rate of speed in the City of New York, in the Borough of Manhattan.

PLAINTIFF'S COUNSEL: I object to that as incompetent and irrelevant.

The COURT: He may answer, if he knows.

PLAINTIFF'S COUNSEL: Exception.

83 A. Eight miles an hour. Our old horse drawn busses were propelled at a speed of about six miles an hour. The

new automobiles are propelled at a speed of eight miles per hour. I intend to convey to the Court the impression that because the new automobiles travel eight miles an hour this additional protection to the public is required of having those boards around them. I testified that on six of these other stages we had these boards around, too. We did not display advertisements on them, except those little signs, one by two. At certain times of the day there may be any regulation with respect to traffic on Fifth avenue.

Q. What regulations are there that you know of?

PLAINTIFF'S COUNSEL: This is all objected to as incompetent, irrelevant and immaterial.

The COURT: He may answer.

PLAINTIFF'S COUNSEL: Exception.

A. It is within the discretion of the Police Commissioner. At certain times of the day the traffic police bar slow moving trucks from Fifth avenue. On such portion of the Avenue at which they consider there is great congestion. Principally from 23d street to 59th street. I testified on the re-direct examination by my counsel that there is a progressive change from residential to business purposes on Fifth avenue. There has been no such change above 59th street that I recall. That part of Fifth avenue above 59th street is not entirely devoted, and has not been for a great many years,
84 to high class residential purposes. There are fruit stands on certain portions of it. I do not mean that on occasional days the police permit persons vending fruit and peanuts along the line of the street, they exist there all the year around. It is a permanent structure. Our stages turn in at 90th street. On the Southeast corner 90th street there is a restaurant and fruit stand. And on the whole route from 60th street to 90th street that is the only thing of that kind.

PLAINTIFF'S COUNSEL: I object, if your Honor please, to the entire line of testimony which is now being elicited, and which bears on the character of the avenue, on the ground that a man has a right in the City of New York to use his property as he likes upon any street, and that the personality of the occupants of the houses has nothing to do with the right of a person going along the street to use his property as he chooses.

The COURT: I think this is proper cross-examination, in view of the direct.

PLAINTIFF'S COUNSEL: Exception.

Some of our old stages carried eighteen passengers on the top, those operated prior to the automobiles; those six that I spoke of. The new ones also accommodate eighteen passengers on top. There is practically no difference in the carrying capacity. I recall having seen advertising signs at the extreme northern end of the station platform at 33d street. I am sure of that. I could not see those that are against the little houses that forms part of the station; but up at the extreme northerly end I could. I could not fix the time defin-

itely, as to when that was I don't know, as a matter of fact,
85 that there are no advertisements displayed on the northerly end of the 33d street station. I don't know that there have not been any advertisements at the ends of the stations in the City of New York for a great many years. I don't know that there are none now.

By PLAINTIFF'S COUNSEL:

Defendant's counsel spoke about our stages turning in. Some turn in at 90th street, and some continue on and beyond over other portions of the avenue.

By DEFENDANT'S COUNSEL:

Sometimes two stages a day. They carry passengers. If there are any to carry. I don't know what our receipts on those stages operated north of 90th street in the last two months have been. I know it has been extremely small. I don't know if it has been as much as $2.00.

Q. Those stages above 90th street are run for purely franchise saving purposes, aren't they?

PLAINTIFF'S COUNSEL: I object to that.

The COURT: He may answer.

PLAINTIFF'S COUNSEL: Exception.

A. Practically.

Q. Absolutely practically?

A. I should say so.

By PLAINTIFF'S COUNSEL:

We do it for revenue as well as for other purposes.

There have been no flags carried on the top of these stages carrying any form of advertisement.

86 Q. Are flags carried on the horse cars in the City of New York?

DEFENDANT'S COUNSEL: I object to that as incompetent, irrelevant and immaterial.

The COURT: Objection sustained.

PLAINTIFF'S COUNSEL: Exception.

Q. Will you state—are you familiar with whether or not there are any advertising signs on the interior of the horse cars in the City of New York?

DEFENDANT'S COUNSEL: That is objected to as incompetent, irrelevant and immaterial.

The COURT: Sustained.

PLAINTIFF'S COUNSEL: Exception.

The COURT: The custom which prevails with reference to the advertising inside of a car or vehicle will not establish the custom as to the outside advertising.

PLAINTIFF'S COUNSEL: Exception.

JOHN BYRNS, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination by PLAINTIFF'S COUNSEL:

I am familiar with the operation of stages in the past in the City of New York. I went to work in Grand street in 1850, and stages were passing the door where I worked every few minutes. Those stages continued in operation until they were superseded by horse cars. I remember there were advertising signs carried on those stages.

87 DEFENDANT'S COUNSEL: May I ask him to fix the time?

The WITNESS: Well, along in '50, '51, '52, '53 and '54—along about that time. I went in business in '59, and I was 40 years there in business. And they carried a sign like a flag at the rear end of the stage advertising various things, and sometimes they run in a panel between the window and the crown of the stage with an advertisement. Sometimes they had them on the top of the stage. The advertisements on the top of the stage were of Barnum's Museum,—circus. Advertisements for wet goods. We used to have a great many of the dry goods stores who used to sell wet goods in those days,—so-called wrecks of steamers; advertising goods from the fires and some theatricals. People rode as they do now, inside and on the top of the stages. On a fine day I used to like to get up on top myself. I observed the operation of the stages on their routes elsewhere in the city at that time, but I am not as familiar with the others. I was at Grand street, Broadway and Canal street. I am not quite as clear about the other lines. This line I saw passing the door every few minutes. This condition with respect to advertising prevailed as long as the stages ran and until they were superseded by the horse cars.

Cross-examination by DEFENDANT'S COUNSEL:

These stages ceased running in front of the premises at which I worked along about '64. I think the railroad was built at Grand street about '64.

Q. What was the character of the neighborhood through
88 which these stages ran?

A. It was one of the leading——

PLAINTIFF'S COUNSEL: I object to this as incompetent, irrelevant and immaterial.

The COURT: Objection overruled.

PLAINTIFF'S COUNSEL: Exception.

THE WITNESS: Grand street was one of the leading business streets in New York fifty years ago. They were changing about that time, about fifty years ago from residences into stores. About 1860 or 1864 when the stages were operating, there was very little residential property along Grand street. Very few along the whole line of this stage. At that time the street car was started as the stage disappeared. The stage disappeared when the street car was built—when the road was built. I cannot recall that I ever saw any advertising boards

on the outside of those street cars that superseded the stages. I don't think I ever saw any. I am not sure on that point. Besides the Barnum advertisement and the museum advertisement they used to advertise the circus and Niblo's Garden. The things advertised on those stages were dry goods stores advertising wet goods. They were places to be easily reached by this line of stages. I don't know about the advertisements displayed on the present line. They did not advertise any particular line of goods irrespective of the place at which it could be bought. John Brown, general goods, or Tom Jones, goods from the wreck of the Mohawk. Tom Jones and John Smith's places were mostly located along the lines of these stages.

89 PLAINTIFF'S COUNSEL: That is our case, if your Honor please.

DEFENDANT'S COUNSEL: If your Honor please, the defendant moves to dismiss the complaint, first, on the ground that no cause of action has been established in favor of the plaintiff against the City; second, upon the ground that no custom which would permit the plaintiff to run these stages with the advertisements visible thereon has been proven; and third, that the franchise under which the plaintiff is operating does not give it the right to display advertisements on the outside of its stages. Next, that advertising on the outside of plaintiff's stages is not necessarily incident to the operation thereof. Next, that streets can be used only for municipal or street purposes, and that the display of advertisements upon plaintiff's stages is neither a municipal nor a street purpose. Next, that the display of said advertisements constitutes a public nuisance. Next, that the plaintiff itself has interrupted its rights to display advertising on the outside of its stages by not establishing the custom thereof, except to the very limited extent testified for many years on its own stages.

The COURT: I will deny the motion for the present, and we will go into the defence at two o'clock.

PLAINTIFF'S COUNSEL: I desire to offer in evidence a reference to Chapter 688 of the Laws of 1892, Section 3, Subdivision 4, which provides that "any corporation which files their organization

90 certificate"—such as was filed in this case—"shall be vested with and entitled to exercise and enjoy all the rights, privileges and franchises which at the time of the sale belonged to or were vested in the corporation last owning the property sold, or its receiver, and shall be subject to all the provisions, duties and obligations imposed by law on such corporations."

DEFENDANT'S COUNSEL: I renew the motion made, now that all the testimony is in, upon the grounds heretofore stated.

The COURT: That motion is denied.

WALTER CLARKE, called as a witness in behalf of the defendant, being duly sworn, testified as follows:

Direct examination by DEFENDANT'S COUNSEL:

My name in full is Walter Clarke. I am a police officer, attached to the third precinct. I am assigned to duty on Fifth avenue and

44th street. I have been on duty along the line of Fifth avenu about 18 years.

I recall the old stages that were operated on Fifth avenue prior t July this year. No advertising appeared on the outside thereof excep these small signs, cards like, standing up. Near the top of the sid of the omnibuses there was one one time of the Hippodrome. Ther were others standing up. Apparently to me those signs were aroun a foot and a half; eighteen inches to two feet; something of tha kind. I think the Hippodrome sign was kind of white, whit ground.

91 Q. But no color like yellow, green or blue ?

A. Well, they were small signs.

Q. Inconspicuous signs, would you say they were?

A. Inconspicuous, yes. They didn't take the appearance of th stage away, or anything.

I have been on duty on Fifth avenue pretty near every day sinc July of this year. That is my post.

There was a gasoline propelled stage operating on Fifth avenu for about a year before these stages were regularly put on. Ther were advertisements displayed on that stage as to destination point the same as the old ones.

Q. What was the nature of the signs that you saw displayed o the horse-drawn vehicles before these gasoline stages were intro duced?

A. They are the ones that I stated.

Q. What was the character of the matter shown on them?

A. Well, it said "Take this stage for the Museum of Art." Tha was one, I think; and for Grant's Tomb another time there wa some sign on it, and then there was a small Luna Park sign; it sai "Take this stage for the Hippodrome." Destination—points o interest. I never noticed on any of the stages prior to July, 1907 an advertisement of any kinds of goods for sale. I have no recollec tion. I have been on that avenue about 18 years with the exceptio of about three months I think. I don't remember ever having see any signs advertising tobacco or liquors.

(No cross-examination.)

92 WILLIAM BLOSS, called as a witness in behalf of the de fendant, being duly sworn, testified as follows:

Direct examination by DEFENDANT'S COUNSEL:

I am a patrolman attached to the Third Sub-Precinct. I am on what is called the traffic squad. My station is at 43rd street and Fifth avenue. My station has been in or about the neighborhood of Fifth avenue for over five years. I recall the old stages drawn by horses operated on Fifth avenue. All the advertising I could see on the exterior was points of interest and destination. Metro politan Museum of Art, "Take this stage for the Hippodrome" and signs of that kind, small signs. They would naturally not attract much attention. The present signs attract attention from what I

see. I recall the one gasoline stage which was operated for about a year prior to July, 1907.

Q. Was there any advertisement displayed on that?

A. I don't remember seeing anything of them.

(No cross-examination.)

RICHARD W. MEADE, recalled and examined by defendant, further testified:

By DEFENDANT'S COUNSEL:

These larger signs I think advertising tobacco products were first displayed in July of this year, Duke's Mixture was advertised first; it continued for some months, then Bull Durham. And then an advertisement of Helmar cigarettes. Within the last ten days,
93 the advertisements have been changed so that Helmar cigarettes now appear advertised on the outside of these stages.

GEORGE C. CRUISE, called as a witness in behalf of the defendant, being duly sworn, testified as follows:

Direct examination by DEFENDANT'S COUNSEL:

I am an examiner attached to the office of the Corporation Counsel of the City of New York.

I recall that acting under instructions I examined the Fifth avenue stages with the advertisements displayed on the outside thereof. I took measurements. I can testify with respect to those measurements.

Q. I show you a paper and ask you whether, using that paper to refresh your recollection, you can testify with respect to it (paper handed witness)?

A. I can.

I dictated that paper to a stenographer, and afterwards swore to it.

On the 3rd day of September this year I went to the southerly end of Washington Square, the terminal of this stage line, in company with a photographer, Mr. Coe, and took measurements of signs and letters and a general description of them. If I am allowed to use these photographs, I can testify——

These photographs are correct representations of what I saw on the stages on that day.

DEFENDANT'S COUNSEL: I offer them in evidence.

94 Marked respectively Defendant's Exhibits 3, 4, 5, and 6.

I will describe the size, color and location of each of those signs, together with the size and color of the letters.

The side signs running along parallel with the side of the stages and from the floor of the upper deck in an upward direction, the sign measures 13 feet long, two feet seven inches in height. There is on each end of the sign the life size bust picture of men smoking. That is Exhibit 3. Then the words "Duke's Mixture" painted in white letters on a dark background. The color of the background is a dark blue. In addition to that there are the words "For pipes"

and "Cigarettes" underneath the words "Duke's Mixture," and a painted package of tobacco with the words "Duke Mixture" on it.

The bust pictures of the men are a natural color; their faces are painted a flesh color or pink; they wear sweaters—one a blue sweater with the letter "C" in white on the breast of it, and the other a brown sweater with the letter "B" on it.

The first letters of the words "Duke's Mixture" were each one foot and about six inches in height; the others were about six to eight inches in height—that is, the remaining letters of the words "Duke's Mixture"—smaller letters. The letters of the words "For pipe" were about three inches in height. That is, "For pipe" and "cigarettes." That describes one sign in Defendant's Exhibit 3.

The next picture is marked Exhibit 5. There are only two side signs. The sign on the other side of the coach measured—the dimensions of the sign is the same as the one I have just de-
95 scribed. Outside dimensions of the sign, and the whole picture is practically the same with the exception, of course, of the bust figures of the men. The bust figures of the men represent two young men, one smoking a pipe and the other a cigarette, in natural civilian—ordinary civilian dress. One is a light gray material and the other a brown. That is the only difference between that and the other sign. A sign was located on the front portion of the stage over the hood, standing upright. It measured two feet one inch in height and ran from one side of the coach to the other, a distance of six feet six inches. The sign was yellow, with the words "Duke's Mixture" in dark letters. Almost a black, a very dark blue, and the words "For pipe" and "for cigarettes" in smaller letters. The words "For pipe" above, and the words "For cigarettes" underneath. I don't find the size of the letters on that sign. The larger letters—that is the letter "D" in the word "Duke's" and the letter "M" in the word "Mixture" were about from sixteen to eighteen inches high. The other letters are about half the size; the shade was a very bright yellow.

I attempted to find for what distance up or down Fifth avenue I could see this sign. The colors on the sign could be seen by me distinctly for half a mile. The other sign, the other exhibit, Defendant's Exhibit 6, there is a sign over the back hood of the coach. It was four feet four inches long by two feet one inch high. The words "Duke's Mixture" and the words "For pipe" and "For cigarettes" were painted in dark letters, almost black, on a yellow background. The background was similar to the background of
96 the sign described before this one. There was another sign running along the side and back of the staircase, leading to the roof of the stage,—the upper deck, a distance of about eight feet long. That sign was painted yellow, with the words "Duke's Mixture Smoking Tobacco" in dark blue letters. I haven't got it here. the width of that sign, it was about twenty inches. There was an additional sign under the staircase. It measured two feet four inches wide and two feet four inches high, and bore the words "Duke's Mixture Smoking Tobacco" painted in dark letters. On the risers of each step leading from the bottom floor of the coach to the roof

f the coach was a blue sign with the words "Duke's Mixture" ainted in yellow letters. Those signs on the risers were visible from he street, nearly all of them. On the upper deck, on the roof of he coach, on the back of each seat were the words "Duke's Mixture" n letters two inches. The whole length of the sign was two feet. Those were not visible from the street. They were painted in black etters.

I observed at the time these photographs were taken and I made hese observations and calculations, the headway between the stages perated by the plaintiff. It was about five minutes' headway. After these signs which I have just described and which were de-icted in Defendant's Exhibits 3, 4, 5, and 6 were withdrawn and thers substituted, I again accompanied the photographer when he nade the photographs of the new signs displayed upon these stages.

I again made measurements of those new signs. These seven photographs you show me depict advertising signs appearing on
97 the stages on Fifth avenue immediately upon the withdrawal of the signs which I have just described.

DEFENDANT'S COUNSEL: I offer them in evidence.

Marked respectively Defendant's Exhibits 7, 8, 9, 10, 11, 12 and 13.

They were taken October 1st, this year. I will describe Defendant's Exhibit 7. Over the hood in front of the stages—in front of this stage is a yellow sign with the words "Genuine Bull Durham Smoking Tobacco." The words "Genuine" and "Smoking Tobacco" are painted in black letters; the words "Bull Durham" are painted in blue letters with white shading. The two first letters of the words "Bull Durham" are nine inches high, the remaining letters being eight inches high. The words "Genuine" and "Smoking Tobacco" are smaller letters. This advertisement was displayed on all the stages operated on Fifth avenue at that time. The same is true with respect to defendant's Exhibits 3, 4, 5 and 6, that the front and rear signs—the same is true with respect to the front and rear signs and the signs on the staircase.

On the sides of Exhibits 3, 4, 5 and 6—during the time these signs remained there they were displayed on all the stages operated by the plaintiff on Fifth avenue, and the other signs that I have described were some of the signs, and all were substantially the same.

By DEFENDANT'S COUNSEL:

I made it my business for a number of weeks to go up and
98 down Fifth avenue and observe these stages. I observed these stages going in both directions on Fifth avenue, passing each other. There is a regular schedule. At the terminus of the road at Washington Square I saw the stages arrive at and depart from it. The time is regulated by a starter who is stationed there, who sends them away on some signal. Tells them to go away. These pictures were taken at Washington Square at that time. I have described this Exhibit.

I observed how far that sign was visible up and down Fifth avenue—that is, the color.

It is visible for about half a mile. That is not true of the sign along the back of the staircase, that is not quite so visible because it does not reach the same height. It is visible for five or six blocks. The same is true with respect to the signs described by me on Defendant's Exhibits 3, 4, 5 and 6. On Defendant's Exhibit 8 the landscape is painted on this picture that runs along the side of the upper portion of the coach; the landscape is representing trees, rocks, grass shrubbery; the foreground is a railroad track.

In the picture of the train approaching in the distance the engine of the train is painted a sort of a light blue or steel color and the cars are painted red. To the left of the picture and standing by the switch signal is the painted picture of a bull, painted brown and white. Along about the center of the picture there is a representation of a sign in the field, with the words "Genuine Bull Durham Smoking Tobacco" painted in yellow on a black background. The figure of the bull on this picture is about two feet long and about the same height. The sign described in the field is four feet six inches long. The first letters of the words "Bull Durham"
99 are each five inches in height, the letters of the remaining words being four inches in height.

I have described the dimensions of the bull. That completes the description of that sign. I will describe Defendant's Exhibit 9. This picture describes a landscape with the fore-quarters, about the fore-quarters of a bull, including his head and shoulders and the front portion of his body painted in brown and white, and the signboard with the words "Bull Durham Genuine Smoking Tobacco" painted on it. The words "Bull Durham Genuine Smoking Tobacco" are of a yellow color, the background being black. To the right of the picture is a package of tobacco with a label on it, with the words "Genuine Durham." This package is painted white with a red band around it and a dark green band over the top, a white tag attached to a string and a black label on the package with the photograph of a bull on it. The figure of the bull on this picture is three feet eight inches long and two feet high.

Exhibit 10 shows a side sign running the full length of the coach; a landscape with a sign-board on the left of the picture, with the words "Genuine Bull Durham Smoking Tobacco" painted thereon in yellow letters. To the right of the picture is painted the figures of two bulls in combat, one a slate color or drab figure of a bull, the other brown and white. The brown and white bull has his horns buried into the flank of the lighter colored bull. The size of each of the bulls is two feet from head to tail. That is about all.

Defendant's Exhibit 11 shows a sign running along the side of the upper portion of the coach, with a bull painted on the left. The bull is about two feet. All of the body is shown. The
100 height of the bull is about the same. The rest of the sign depicts landscape—trees and grass in their natural colors.

Green, red, &c. Showing the sky too in natural colors. All these signs are visible for a long distance.

Exhibit 12 shows a bull painted red and white standing in the bull ground, in the center of what appears to be an arena, and in the distance there is the picture of a horse, lying down, with blood flowing from its side, and the figures of four or five men in different position, in various colors intending to depict a bull fight. In back of the picture there was an auditorium. The background of the picture shows an auditorium with numerous seats and people in it. On the left of the picture appears what might be the royal box. Surrounding that royal box there are variegated colored flags, blue, white, yellow and green. The figures in the royal box are of various colors; in fact, along the bottom of this box is painted a black sign with yellow letters and the words "Genuine Bull Durham Smoking Tobacco." I have seen all this sign and all the letters. They are about six or seven inches high, the larger letters. Defendant's Exhibit 13 is exactly like the rear sign that I have heretofore described with the words "Bull Durham," "For the Pipe," and "For the Cigarette," with the exception that on the sign appears "Genuine Bull Durham Smoking Tobacco" where the words "Duke's Mixture" appeared. The sign is that bright yellow that is visible for about half a mile. I have only four more pictures, and those are the new ones that have been taken December 9th. I saw those photographs taken. They were taken at Washington square.
101 They depict advertising signs displayed upon the stages operated by the plaintiff on Fifth avenue. The stages run in both directions; pass each other.

DEFENDANT'S COUNSEL: I offer those in evidence.

Marked respectively Defendant's Exhibits 14, 15, 16 and 17.

I will describe Defendant's Exhibit 14. This is a side picture of the same dimensions—a side sign of the same dimensions as the side signs on the pictures described before. It represents a scene in some eastern country. On the left of the picture is a stone wall painted in black with the words "Helmar Turkish Cigarettes" painted in white letters, with a dark shading—black shading. The size of this sign is about four feet long. I testify now from original memorandum made by me. The first letter of the word Helmar measures about twelve inches, and the last letter, the letter "R" of the word "Helmar" about nine inches. The words "Turkish Cigarettes" are in smaller letters. To the right of the picture are the figures of two pack camels and three men in eastern costume, of various colors; red, blue and white principally. The camels are a natural color, sort of a brownish gray, or some color. In addition to the figures of the camels there is a red blue and indigo sky. It is intended to represent an Oriental sky, a sort of a sunset; and some ruins of broken columns are left standing alone. To the extreme right is the painted picture of a cigarette package; it is painted in green, principally in green and yellow, with white letters
102 "Helmar Turkish Tobacco Cigarettes," and in the center the bust figure of a woman in white. The size of the picture is

about 20 by 16. I mean the picture of the package of cigarettes is 20 by 16 inches. I have substantially described that. The other side of the sign (Exhibit 16), shows a picture of a stone structure like a fortress; it is painted brown, and on the side of this fortress are the words "Helmar Turkish Cigarettes" painted in white, and the word "Helmar" is shaded black in white letters. There is a blue sky, and the sand or ground is yellow and blue. There is the figure of a man in eastern costume, white costume, seated on a camel, with a lighted torch held aloft; in the distance there is a camp of four or five tents and a light blazing up from the center of the camp. It is a fire; a yellow color. To the extreme right is a painted package in green, principally in green and yellow, of a package of cigarettes, with the head of a woman, head and bust; about the same size to the one I described in Exhibit 13. The letters they gradually get smaller on one end. The larger letters are about ten inches and a half. In addition to the side signs shown on Defendant's Exhibit just described by me, Exhibits 14 to 17, there are other advertising signs displayed on the side of these stages which are not here in the pictures. And those are of a character similar to those which have been described, except that there is more red on them than these. On Car No. 15, there was a sign on the side with a yellow sky, and down near the portion representing the earth the sky was red. There was a red sign on the ruins or stone work that was represented in the picture. This sign was six feet long, and the letters
103 about ten inches high. The letters on this sign were painted in white. It represented a man and camel in a sitting position, the man in green costume, Turkish costume, on him. The sand or ground part in this picture showed a yellow, light yellow. Car No. 6 showed a red stone structure on the side sign. The words "Helmar Cigarettes" were on the side of the structure. The word "Helmar" was six feet long. There was a figure on the left of the Sphinx with a package of cigarettes, leaning against the stone figure of the Sphinx. This photograph was painted a blue or drab color. The package of cigarettes was about the same description and dimensions as the other packages described—painted packages.

The defendant's Exhibits 15 and 17 that I have in my hand, the dimensions of those signs are practically the same as those of the front and rear signs heretofore described by me—the dimensions of the signs and the lettering on them. They are all painted in bright red. On the front sign appears "Helmar Turkish Cigarettes," and on the back sign the same. They are relatively in the same position as the signs advertising Duke's Mixture and Bull Durham. The side sign under the staircase is just the same. All signs are in the same position, only the wording is different. Practically the same size—the letters. Since July, 1907, I have seen on these stages advertisements of three different kinds of tobacco product. One in July, then one towards the end of August or September and then one within the last ten days.

I have since court adjourned examined from the street the elevated railroad station at 32nd street and Sixth avenue. I could not from

any position of the street observe any advertising signs upon
104 the stations or platforms of the elevated structure at 32nd street. There are none displayed at the end of the platform which I can see from the street. None there at all. I went to all spots with a view of trying to find out. The only portion of advertising is in the center where the enclosed portion of the station is erected. That is not visible from the street.

Cross-examination by PLAINTIFF'S COUNSEL:

I am familiar with Fifth avenue as a thoroughfare. A number of people go up and down. I know where the Flatiron Building is. On the ground floor of said building there is a tobacco store. It advertises tobacco, but not very conspicuous. There are boxes of cigars, pipes. Very fancy pipes. I don't recall any pictures. You cannot see this store from a distance of half a mile. Not when the street is clear. I have stated that those signs on the omnibuses were visible for a distance of half a mile. When I said the signs were visible I did not mean that I could see the objects upon them. I couldn't read the signs at that distance. I could see the colors very distinctly half a mile. The number of people passing the Flatiron Building is not as great as the number of people that passes any other portion of Fifth avenue. There are more people passing 42nd and 34th street. I think there is a store of the tobacco company on Fifth avenue at 42nd street, I am not positive. I have referred to the risers of the steps on these stages, and the advertising which appears upon them. I have observed similar advertising matter on the steps of the elevated railroad company. That is, there were signs there. I do not say there was similar advertising.
105 I never noticed them advertising tobacco. Advertising other things, practically the same size. But advertising Pearline and other useful commodities. I know where the Bowery is and the fact that the elevated tracks are on each side of that thoroughfare. I can see the platforms from the other side of the street. I think you can see the interior of the platforms.

Q. Don't you know that you can see from the other side of the street the interior of the elevated station, and the interior of the platforms from there?

A. I have never noticed.

ROBERT W. DE FOREST, called as a witness in behalf of the defendant, being duly affirmed, testified as follows:

Direct examination by DEFENDANT'S COUNSEL:

I reside at 7 Washington Square north. I am a citizen of the City of New York. I am president of the Art Commission of the City of New York.

Q. Were you appointed by the Mayor pursuant to the provisions of Sections 633, 634, 635 and 636 of the Greater New York Charter, president of that commission?

PLAINTIFF'S COUNSEL: That is objected to as incompetent, irrelevant and immaterial.

Objection overruled. Exception.

A. I was.

Q. Are you also a trustee of the Metropolitan Museum of Art?

106 PLAINTIFF'S COUNSEL: Objected to as incompetent, irrelevant and immaterial.

Objection overruled. Exception.

A. I am.

That is on Fifth avenue opposite 82nd street.

I am also a member of the University Club, situated at 54th street and Fifth avenue.

I have noticed the advertising signs displayed daily on these Fifth avenue stages since July of this year. I have observed them since I returned regularly to the city in the summer, possibly not as far back as July. I recall the time when stages were operated on Fifth avenue before the present stage coaches, before the present buses were there. I don't ever remember having seen any advertisement on any of the stages that plied on Fifth avenue previously. I saw signs—"this stage for the Metropolitan Museum of Art" I was going to say except an occasional sign of direction. But absolutely no advertisement of any commodity.

I don't recall a single instance in which I have observed the advertisement of any commodity or any advertisement of such upon any stage in the city of New York prior to July of this year. My memory goes back to the time when there were no street cars and when all the transportation in New York was done by stages. It goes back to the 50's, to the 60's. I have seen the signs displayed on these stages. I don't know whether you would call that examining them particularly.

I have not observed any advertising signs upon the outside of any street car in the city of New York unless it be a sign of direc-
107 tion, indicating from Madison avenue, or—— I have never seen any advertising signs upon the outside of elevated trains or cars in the city of New York.

(No cross examination.)

DEFENDANT'S COUNSEL: I desire, if your Honor please, to offer in evidence the following ordinances of the City of New York:

"Ordinance adopted by the Board of Aldermen on the 6th day of June, 1882, and approved by the Mayor on the 19th day of June, 1882, which reads as follows:

PLAINTIFF'S COUNSEL: Is that in force now?

DEFENDANT'S COUNSEL: No, sir.

PLAINTIFF'S COUNSEL: I object to it as being incompetent, irrelevant and immaterial.

Objection overruled; exception.

DEFENDANT'S COUNSEL: The ordinance is as follows:

"The Mayor, Aldermen and Commonalty of the City of New York do ordain as follows:

"SECTION 1——"

PLAINTIFF'S COUNSEL: After it has been read I shall have some other objections. I suppose the proper way is to reserve those objections until it has been read.

The COURT: Yes.

DEFENDANT'S COUNSEL (Reading):

"SECTION 1. That no advertising trucks, vans or wagons
108 shall be allowed in the streets of the City of New York under a penalty of $10 for each offense.

SECTION 2. Nothing herein contained shall prevent the putting of business notices upon ordinary business wagons so long as such wagons are engaged in the usual business or regular work of the owner and not used merely or mainly for advertising.

SECTION 3. All ordinances or resolutions, or parts thereof, inconsistent or conflicting with the provisions of these ordinances are hereby repealed.

SECTION 4. This ordinance shall take effect on the 1st day of July, 1882."

PLAINTIFF'S COUNSEL: I object to that on these grounds: In the first place, by the express language of that ordinance, it has not any bearing on stages. The language is clear and specific. Here is the proposition of this act that is to say, there is the noun to which everything else in the context is an adjective, "no advertising trucks, vans or wagons"? Now what does that mean? It means what your Honor and I could see at any time of day parading up and down Broadwy, or parading up and down Fifth avenue, a van roofed over, carrying no passengers, doing nothing but advertising the wares of somebody. In one instance there is an ancient stage goes around with a hurdy-gurdy inside and advertising matter on the outside exclusively. Now, that is what this ordinance directs itself against. "No advertising trucks, vans or wagons." Now, how long since a stage, irrespective of this advertising on portions not used for passengers—how long since that was a truck or van or a wagon?
109 How long since this language applied to anything of that kind? The old condition was that this city found itself perplexed by a multitude of these wagons that glutted traffic, that caused a direct nuisance, and it did not require an ordinance to stop that sort of thing provided the congestion was such, providing the advertisement was such as to cause the drawing of a crowd around upon the street. That is what this ordinance refers to, and it has not any bearing or relevancy whatever to approach that coach such as operated at the present time.

THE COURT: I will receive the statute. If it does not affect them it cannot be injurious to them. I will receive it.

PLAINTIFF'S COUNSEL: Exception.

DEFENDANT'S COUNSEL: I desire to offer in evidence the ordinance adopted by the Board of Aldermen of the City of New York on the 9th day of March, 1897 and approved by the Mayor on the 15th day

of March, 1897, particularly Sections 669 and 670 thereof, which read as follows:

"SECTION 669. No advertising trucks, vans or wagons shall be allowed in the City of New York under a penalty of $10 for each offense.

"SECTION 670. Nothing herein contained shall prevent the putting of business notices upon business wagons so long as such wagons are engaged in the usual business or regular work of the owner and not used merely or mainly for advertising."

110 PLAINTIFF'S COUNSEL: I object to the second ordinance on the grounds which I stated with respect to the first.

Objection overruled; exception.

PLAINTIFF'S COUNSEL: Your Honor allows me an exception to the introduction of the first one?

The COURT: Yes.

DEFENDANT'S COUNSEL: It is conceded then that the ordinance first read continued in force until the ordinance second read became operative, subject to corection.

PLAINTIFF'S COUNSEL: Yes.

DEFENDANT'S COUNSEL: And also that that ordinance just read continued in force until the adoption by the Board of Aldermen of the City of New York on the 30th day of October, 1906, and the approval by the Mayor on the 8th day of November, 1906, of the Code of Ordinances of said city.

Section 41 of Chapter 2 of Article IV of part 2 thereof is as follows:

"SECTION 41. No advertising trucks, vans or wagons shall be allowed in the streets of the Borough of Manhattan under a penalty of $10 for each offense. Nothing herein contained shall prevent the putting of business notices upon ordinary business wagons so long as such wagons are engaged in the usual business or work of the owner and not used merely or mainly for advertising."

And that that ordinance has been in force from that day until this.

111 PLAINTIFF'S COUNSEL: But I do admit that they have appeared on the ordinances of the city and have not during that time been repealed.

PLAINTIFF'S COUNSEL: If your Honor please, I have to amplify my objection and direct it specifically as against the last being the one which is now in force. I object to the introduction of this ordinance in evidence for three reasons. In the first place, the City Charter did not give the Board of Aldermen the power to adopt such an ordinance as that at the time it was adopted. In the second place, the City Charter could not constitutionally have given such power if it had attempted to do so. In the third place, as I have stated in my objection to the wording of the first ordinance, it has no bearing upon our case because the vehicles which we operate are not advertising vans or trucks. In support of my first proposition I want to call your Honor's attention to this. The City Charter gives the Board of Aldermen the power to regulate; it does not give them the power to prohibit.

Objection overruled. Exception.

NEW YORK, *December* 18, 1907—10:30 a. m.

The COURT: Met pursuant to adjournment.

Trial Resumed.

DEFENDANT'S COUNSEL: I desire to offer in evidence, if
112 your Honor please, the heading of Chapter 2, Article IV, of Part II of the Code of Ordinances of the City of New York.

PLAINTIFF'S COUNSEL: I object to the introduction of the receipt or the caption of this chapter, for this reason. It is not a *a* part of the act itself. It is a characterization of the act, and I believe they are not regarded as a part of the act in cases which have construed them.

The COURT: I will receive it.

PLAINTIFF'S COUNSEL: Exception.

DEFENDANT'S COUNSEL: The defendant rests.

JESSE WINEBURGH, called as a witness on behalf of the plaintiff in rebuttal, testifies as follows:

Direct examination by PLAINTIFF'S COUNSEL:

I am in the advertising business. I have been engaged in that business practically fifteen years. I have been so engaged in New York City. My business very seldom carried me into other cities; only to solicit business from other cities for New York City.

The stages which operate on Fifth avenue and other streets within my observation carried advertising matter prior to July of this year.

As long as I can remember there has been some advertising on the roofs of the stages, and I have sold it back as far as three years ago to different advertisers—as far back, I think, as three or four years
ago. I have some contracts there showing it. I want to get
113 my mind on the date. I know it is three years ago, if not longer.

I have several papers which purport to be original contracts signed by me as President, and an examination of those papers will enable me to refresh my recollection as to the exact date.

A flag at each end of the car has been displayed on the exterior of cars during the last ten years; advertising has been carried on these flags. Various goods—Ehrich Brothers; Starin, Glen Island, Carbona Cleaning Fluid. They have all the flags now at the present time. (Paper handed to witness). I did put it down there. In 1897 there was Ehrich Brothers—I did not say 1907—ten years back—1897. And Koch had it in 1899; and Croft Brothers, Carpets, had some of it in 1898. L. M. Hirsch, Shoe Store, had them in 1896, including Grand street, in 1898. Partland & Flaherty had them 1901. They had them for several years. Moe Levy has had it ever since 1899, downtown, like Cortlandt street and East Broadway. Luna Park they had the busses 1905, 1906 and 1907. They had four of those flags. Those are larger sized flags on the busses. At the present time these advertisements appear principally on the horse car lines.

The WITNESS: 28th and 29th street lines; and some on the 18th street line. These are all crosstown lines principally we put them on. We kept them off the other lines ourselves because——

DEFENDANT'S COUNSEL: No; I object.
The COURT: Strike that out.
PLAINTIFF'S COUNSEL: Exception.

Advertising matter has appeared on the other parts of the
114 cars than on the flags which I have described. On what they call the dashboards there have frequently been announcements—advertisements of skating rinks and dance halls. Pretty nearly all cars in the City of New York in the year 1897 carried these flags. Well, that is part of the city, but they were on pretty near all the cars in the City of New York. They were on all the cars where we had sold the advertising privilege to an advertiser.

DEFENDANT'S COUNSEL: What was on all the cars?
The WITNESS: The advertising flag on both ends of the car.

The COURT: Strike out the answer.
PLAINTIFF'S COUNSEL: Exception.
Repeat the question, Mr. Stenographer.
(Question read.)
The COURT: We have absolutely nothing to do with the selling of privileges by the witness, irrespective of who sold the privileges, or who did not.

Very nearly all the cars in the City of New York carry these advertising flags to-day. I am familiar with and have in the course of my business observed the character of advertising that is done underneath—done upon the streets by means of posters affixed to the stairways of the elevated railway companies, which terminate in canopies upon the streets at the base of the various flights of steps, both on the interior and exterior. At the bottom of the stairway there is a canopy and there is a signboard as you come down the staircase that you see from the inside, and then a much larger
115 one on the outside which you see from the sidewalk—the street. It now has and has had for a good many years the advertisement of the National Biscuit Company—that is on the outside, and on the inside Hunter Rye Whiskey. The National Biscuit Company's advertisement is on the outside, and you cannot see that as you come down the steps. Underneath, on the under side of the stairway which looks down into the street—that is, on the riser—on the bottom of the staircase—they have three boards there—one on each staircase.

Q. What do they advertise?

A. Everything. Carter's Little Liver Pills had that for a long time. I don't think they have it now, though.

DEFENDANT'S COUNSEL: I ask that the testimony about Carter's Little Liver Pills be stricken out as not responsive. He asked what was there now.

The COURT: Motion granted.
PLAINTIFF'S COUNSEL: Exception.

I recall within the last year upon the under side of the elevated railway's stairways—I mean the staircase—signs that faced the sidewalk; there is advertising there, but I cannot recall what advertising, because they change so frequently. These advertisements which I have observed there during the last year were done in various colors. This character of advertising has prevailed in and around the steps and upon the under side facing the street and elevated railway steps. As long back as my memory serves me—twenty years.

Q. Do you know anything about the carrying of advertising signs upon omnibusses or cars in the City of Philadelphia?

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A. Yes, sir.

Q. Will you state what advertising signs are carried upon the exterior of public conveyances in that city?

DEFENDANT'S COUNSEL: That is objected to as not a like circumstance.

The COURT: Objection sustained. I do not think the custom which prevails there bears upon this question here.

PLAINTIFF'S COUNSEL: Exception.

The COURT: I do not think it is admissible, if it had been it should have been part of the original case. That has not been justified by anything that has been in the case on this trial, and I will exclude it.

PLAINTIFF'S COUNSEL: Exception.

Cross-examination by DEFENDANT'S COUNSEL:

I am an officer of the Railway Advertising Company. That is the company that has the privilege of the advertisements upon the Fifth avenue Coach Company; it is either that or the New York City Car Advertising Company. I have the privilege for the display of advertisements in and outside of the stages of the Fifth Avenue Coach Company; one of the companies that I am an officer of has that privilege; and to that extent I am interested in the result of this litigation. In 1897 there were certain flags on street cars generally in the City of New York.

I can refer to this and give you the exact size (examining paper). No, the contract does not even state the exact size. Approximately the size of these flags was two feet square or less. Not more than that. It is not a fact that they were less than a foot. They were over a foot square. I have one right here, if you want to see it; they were on each end and on the top of the car—on pivots swung around. We did put those flags up there over the roof of the street cars fastened permanently, but they interfered with the trolley. We did that five years back in the Bronx—all over the Bronx—over the Harlem River. We are not doing it now. We discontinued about three years ago. We had these flags permanently affixed to the top alongside the roof of cars in the Borough of Manhattan. We had a little socket, and the pivot sat in the socket, and on that socket we had the flag, so it would revolve and

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show both sides. The only flag we showed in the Borough of Manhattan was on a pivot.

Q. When you testified that you had these flags permanently affixed to the top, they were not in the Borough of Manhattan?

A. Would you not call that permanent?

Q. Well, you could take it right out?

A. Certainly, but you could do that with those in the Bronx, too. The only difference was that they were in a socket which sat that way (illustrating) on the side, not to interfere with the trolley pole.

Q. In other words, none of the flags or advertisements visible on any of the cars were affixed to the car itself?

A. We never do that, because we have to take them down and paint them.

Q. Answer my question. None of them were affixed to the car?

A. If so, you could not take them down.

Q. But you could lift them up?

A. No; but by taking out bolts or screws you could take them off. The largest size signs I ever displayed on any public
118 conveyance in the Borough of Manhattan prior to the display of these signs on the Fifth avenue stages, were some on the dashboard which were about three feet long in width, I should say, and about two and a half feet in depth. Those are the very largest signs that ever appeared anywhere on any public conveyance in the City of New York until the signs appeared on the Fifth avenue stages; that is about as large as I remember—the largest signs appeared on the dashboards. No signs of that character appeared above the windows of any public conveyance in the City of New York until they were introduced on the Fifth avenue stages; not to my knowledge. I didn't think any advertising matter had been displayed on the Madison avenue cars at any time within the last five years—on the exterior thereof; I don't think any advertising matter has been displayed on the Broadway cars at any time within the last five years. No advertising matter, to my knowledge, has been displayed on the Lexington avenue cars within the last five years. No advertising matter, to my knowledge, has been displayed on the Sixth avenue cars within the last five years. I know that one time somebody else accepted contracts. No advertising matter has been displayed on the outside of the elevated railroad trains at any time. No advertising matter has been displayed on the outside of any of the subway trains since that road is in operation. Not the trains themselves; no. The crosstown lines are not the only cars upon which the only advertising appears in the City of New York. Advertising appears on the Belt line cars. That is not commonly regarded as a crosstown line. It is a horse-propelled line.
119 On the electric propelled part of the so-called Belt line route there are no advertisements displayed; but on the horse-propelled part of it there are advertisements displayed.

Q. So it seems that when horse power is supplanted by electricity as a motive power in the City of New York advertisement on the exterior ceases?

PLAINTIFF'S COUNSEL: That is objected to as incompetent, irrelevant and immaterial.

The COURT: Objection overruled.

PLAINTIFF'S COUNSEL: Exception.

The WITNESS: May I explain?

Q. Answer yes or no.

A. No.

Q. State one electric propelled street railroad car upon which outside advertising appears upon the cars in the Borough of Manhattan?

A. None. The character of the matter upon those advertising flags concerning which I have testified to as being on the street cars was of dry goods houses, such as Ehrich Brothers, dry goods, 23d street—14th street. Those cars did not come close to Ehrich Brothers' place; they transferred to there, but the cars do not touch this point. The advertisement of Koch appeared on all the cars of the Union Railway; that is the Bronx; and also in the Borough of Manhattan—on 125th street, Third avenue, Second avenue. Some of the Third avenue cars turn into 125th street. Koch is on 125th street. Koch's advertisement appeared on cars below 116th street on the Second avenue, First avenue, Third avenue, and went right down to the bridge. The First avenue cars are propelled by horse power; the Second and Third avenue cars transfer
120 right over to Koch's. The advertisements of Koch's were prior to five years ago on the Broadway system. With respect to the advertisements appearing on the dashboard signs were frequently displayed such as "This car to the Polo Grounds;" for instance, when the baseball season was in vogue. That merely was an advertisement for the company to get passengers to take them; and "St. Nicholas Skating Rink;" that also was a notice to passengers who traveled on the cars. Dry goods houses advertised on the dashboard of street surface railroads in the City of New York. Dry goods houses have commodities for sale. I saw the advertisement of the dry goods house of R. H. Macy on the dashboard of cars. They have not appeared within the last five years. When I did see it it was on all kinds of cars. I saw it on trolley cars too prior to five years ago, but not subsequent to five years ago. When I saw it it was on cars other than those which ran right in the line of Macy's store. All lines had it. This advertisement of Macy's was on the front and back dashboards. It was on the side of the dashboard just so it would not interfere with the number on the dashboard. It covered the rest of the dashboard; sometimes there would be one on each side of the number. I want to make myself clear. This is prior to five years ago. This was ten years ago. R. H. Macy & Company were at 14th street at that time. I saw it on pretty nearly all the cars. I saw it on the Broadway cars and on the Sixth avenue cars. I saw it on the Eighth avenue cars; also on the Madison avenue and Fourth avenue cars; and on pretty nearly
all cars. I saw it on the Lexington avenue cars; on the
121 Third avenue cars; on the Second avenue cars; and the Belt line cars; and the Ninth avenue cars; and the Tenth avenue cars.

Q. Did you see it on the Cortlandt street cars?

A. Are you talking of this particular advertisement, or any advertisement?

Q. I am talking about the Macy advertisement?

A. Then it may have been others. I remember seeing the advertisement, but it probably was not all of one concern, but I have seen the advertisement of Macy also. I don't think I could remember on just what cars I saw the advertisement of Macy covering the front and rear of the dashboard, with the exception of the numbers. I saw it on some cars. I cannot remember what part of the city the cars were in that I saw this advertising on. I cannot testify whether it was uptown or downtown. I cannot tell whether it was on the East Side or the West Side. I cannot tell whether I saw it on one car or a hundred cars. I cannot give any testimony with any degree of particularity as to these advertisements of R. H. Macy & Co. I saw these signs prior to ten years ago; probably back as far as 1891 or 1892; probably not more recently than that. It is possible that it was prior to that time; since that time I have not seen any of these advertising signs of any dry goods house on the dashboard. I have seen nothing but this card "To the Polo Grounds" and this card "To St. Nicholas Rink," or "Fort George," or something of that kind, point or destination or of interest along the route which the car traversed. I could not very well recall what were on those advertising signs I saw fifteen years ago. Those advertising signs I saw fifteen years ago on the dashboard,
122 as near as I can remember, were three feet long by two and one-half feet deep. I do not know whether they were or not on electrical propelled cars. I am quite sure they were on the horse cars. I cannot testify positively whether or not they were on the electrically propelled cars.

I don't recall seeing any of these advertising signs on the cars that were propelled by electricity at any time—fifteen, twenty or thirty years ago—unless it was those that you mentioned. I mean the signs showing the points of interest along the line of the road or of destination. Some attraction of that kind; otherwise than that I testify that on no electrically propelled car, to my knowledge, did any advertisement appear of a dry goods firm. The size of these signs which called atention to the points of interest along the route of the line and to the destination was about three feet in width and about two and a half feet in depth. They were made of wood or metal.

Q. The signs you speak of "This Car to the Polo Grounds" are put on by the company itself?

A. No; the advertising people put it on.

Q. For compensation?

A. Yes, sir. I have the contracts right there, if you want them.

DEFENDANT'S COUNSEL: I object and ask that that be stricken out.

THE COURT: Strike it out.

PLAINTIFF'S COUNSEL: Exception.

Q. What cars carry advertising flags to-day?

A. About six hundred cars.

Q. I did not ask that. The cars of what line is what I want to know. I did not ask the number.

123 DEFENDANT'S COUNSEL: I ask that that be stricken out.

The COURT: Strike it out.

PLAINTIFF'S COUNSEL: Exception.

A. I have a memorandum there on the desk right there. The following cars carry advertising flags to-day, viz., Fulton street, Chambers street, Houston street, Seventeenth and Eighteenth streets, Canal street, One Hundred and Tenth street, The West Side Belt Line, First avenue. Every one of these cars that carry advertising flags are drawn by horses. No car propelled by other motive power than horse power bears any of these flags.

DEFENDANT'S COUNSEL: That is all.

PLAINTIFF'S COUNSEL: We have no more witnesses. This witness has covered what I propose to offer.

The COURT: So, that is the close of the case?

PLAINTIFF'S COUNSEL: Yes.

DEFENDANT'S COUNSEL: I desire to move to dismiss the complaint on the grounds heretofore stated, and on the further ground now that no evidence has been adduced that the advertising is ordinarily incident to the operation of a stage line such as the one operated by the plaintiff on Fifth avenue.

Testimony closed.

124 PLAINTIFF'S EXHIBIT A.

Certificate of Incorporation of Fifth Avenue Transportation Company, Limited.

STATE OF NEW YORK,
Office of the Secretary of State, ss:

It is hereby certified that an original certificate for the formation of a corporation in the class of Limited liability corporations, under the corporate name of Fifth Avenue Transportation Company (Limited) was filed in the office of the Secretary of State, under Chapter 611, Laws of 1875, entitled "An act to provide for the organization and regulation of certain business corporations" on the 29th day of October, 1885, and that the following is a true and correct copy of said original certificate (the same having been compared with said original) and of the whole thereof.

This Certificate of Incorporation made at the city of New York, in the State of New York, this twenty-eighth day of October, in the year one thousand eight hundred and eighty-five,

Witnesseth that Ely Ely-Goddard, Thomas J. Brown, Albert H. Wheeler, Bradish Johnson, junior, and Charles C. Delmonico, all citizens and residents of this State, propose to form a corporation

under and by virtue of the provisions of an act of the Legislature of the State of New York, entitled "An Act to provide for the organization and regulation of certain business corporations," passed
125 the 21st day of June, 1875, being Chapter 611 of the Laws of 1875, and all acts amendatory thereof and supplementary thereto;

And sets forth that:

1. The name of the proposed corporation is Fifth Avenue Transportation Company (Limited:)

2. The object for which it is to be formed (including the nature of its business), is (to carry passengers and property for hire, in all kinds of vehicles drawn by horses, excepting tram-cars; to establish, maintain and operate stage or wagonette routes for public use in the conveyance of persons and property; to take and convey persons and property in stages or wagonettes and to provide and run the necessary stages or wagonettes, or both upon its routes for the public use, and to receive compensation therefor upon acquiring authority to establish, maintain and operate such routes; and to keep on livery, and for its own use, and for hire to others to use, horses, harness and all kinds of vehicles drawn by horses, excepting tram-cars; to deal in horses and to manufacture and deal in harness and all kinds of vehicles drawn by horses, excepting tram-cars, and all kinds of merchandise and commodities pertaining to or incidentally connected with, or necessary and useful in the business aforesaid or which can be made or dealt in profitably in connection with said business, or any and all of its branches; to purchase, lease, hold, use, sublet, sell and exchange all such real estate and other property as may be necessary or convenient for the establishment, maintenance and operation of its business and the erection and maintenance of
126 buildings and other accommodations necessary to fully accomplish the objects of its incorporation, including stables, blacksmith shops and farrieries in connection with such stables, and all necessary and useful buildings, fixtures and machinery for the accommodation of its passengers, freight and parcels).

And the locality of its business is the City of New York and its vicinity.

3. The amount and description of the capital stock is three hundred thousand dollars in shares of twenty-five dollars each.

4. The number of shares of which said capital stock shall consist is twelve thousand.

5. The location of the principal business office is the City of New York.

6. The duration of the corporation is fifty years.

In witness whereof, each of the above-named persons has signed this certificate the day and year first herein above written.

ELY ELY-GODDARD.
THOMAS J. BROWN.
ALBERT H. WHEELER.
BRADISH JOHNSON, JR.
CHARLES C. DELMONICO.

STATE OF NEW YORK,
City and County of New York, ss:

On this 28th day of October, A. D. 1885, before me personally came Ely Ely-Goddard, Thomas J. Brown, Albert H. Wheeler, Bradish Johnson junior, and Charles C. Delmonico, to me known and known to me to be the persons named in and who exe-
127 cuted the foregoing certificate, and they severally acknowledged to me that they executed the same.

[SEAL.]

W. R. BARBOUR,
Notary Public (281), *N. Y. County.*

And it is Further Hereby Certified, That upon the filing of said Certificate, of which the foregoing is a true and correct copy, on the 29th day of October, 1885, as aforesaid a license was issued by the Secretary of State, pursuant to said act to the five persons named in and who made and acknowledged said certificate, empowering them as commissioners, to open books for subscriptions to the Capital Stock of said proposed corporation, at such times and places as they might determine.

And a verified record of the proceedings of said commissioners, having this 28th day of November, 1885, been filed in the office of the Secretary of State, containing a copy of the subscription list to the Capital Stock of said proposed corporation, together with a copy of the By-Laws for said proposed corporation, adopted by the subscribers to said Capital Stock at a meeting of said subscribers held at No. 212 Fifth Avenue in the city of New York on the 25th day of November, 1885, pursuant to the provisions of said act, as appears from said verified record aforesaid, at which subscribers' meeting as aforesaid, thirteen directors (being the number provided for in the said By-Laws of said proposed corporation) were also chosen, whose names as further appears from said verified record of proceedings, filed as aforesaid, are as follows, to wit:

Ambrose C. Kingsland.
Sidney Dillon.
Charles H. T. Collis.
Russell Sage.
Herbert C. Pell.
Bradish Johnson, Jr.
Eugene M. Earle.
Ely Ely Goddard.
Albert H. Wheeler.
Thomas J. Brown.
Charles C. Delmonico.
William S. Hawk and
Clarence A. Seward.

128 Now, Therefore, I, Joseph B. Carr, Secretary of State, do hereby certify that said corporation, to wit:

Fifth Avenue Transportation Company (Limited), is fully organized in accordance with said act, Chapter 611, Laws of 1875; and that all the provisions of said act have been duly observed in the organization of said corporation as herein above set forth.

Witness, my hand and the seal of office of the Secretary of State, at the City of Albany, this 28th day of November, 1885.

[SEAL.]

JOSEPH B. CARR,
Secretary of State.

Recorded Nov. 28th, 1885, and agrees with the original as compared therewith by me.

ANSON S. WOOD,
Deputy Secretary of State.

STATE OF NEW YORK,
Office of the Secretary of State, ss:

I have compared the preceding copy of Certificate of Incorporation of Fifth Avenue Transportation Company (Limited), with the record thereof remaining in this office, in Book entitled "Record of Incorporations," Number 7, at Page 285 and I do hereby certify the same to be a correct transcript therefrom and of the whole thereof.

Witness, my hand and the seal of office of the Secretary of State, at the City of Albany, this twenty-second day of November, one thousand nine hundred and seven.

[SEAL.] JAMES L. WHALEN,
Deputy Secretary of State.

129 STATE OF NEW YORK,
County of New York, ss:

I, Peter J. Dooling, Clerk of the said County and Clerk of the Supreme Court of said State for said County, Do Certify, That I have compared the preceding with the original Certificate of incorporation of Fifth Avenue Transportation Company (Limited), on file in my office, and that the same is a correct transcript therefrom, and of the whole of such original.

Indorsed, Filed and Recorded Nov. 28, 1885, 2h. 45m.

In witness whereof, I have hereunto subscribed my name and affixed my official seal this 29th day of Nov., 1907.

[SEAL.] PETER J. DOOLING, *Clerk.*

PLAINTIFF'S EXHIBIT B.

Fifth Avenue Transportation Co. (Ltd.) Original Franchise.

Chapter 536 of the Laws of 1886.

An Act to authorize the Fifth Avenue Transportation Company (Limited), or its assigns, to run stages on Fifth avenue through Washington Park, and through South Fifth avenue to the Bleecker Street Elevated Railway Station, in the City of New York, and return. Passed June 2, 1886, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

130 SECTION 1. That the Fifth Avenue Transportation Company (Limited), a company organized under the laws of the State of New York, and its assigns, be and they are hereby authorized, on payment of the license fees as hereinafter provided, to run and drive, or cause to be run and driven, and without further author-

ity from said city, a line of stages, or carriages, for the transportation of passengers for hire, from Eighty-ninth street in the city of New York down Fifth avenue, across Washington Park, and along South Fifth avenue to the Bleecker Street Elevated station and return, provided that the consent thereto in writing of a majority of the owners of the property on the avenue and streets wherein such stages or carriages are hereby authorized shall have been obtained and filed with the Mayor of said city.

SECTION 2. And be it further enacted, that the aforesaid company, or its assigns, shall pay to the said city an annual license fee equal in amount to the sum heretofore paid as such license fee, to the said city, by the proprietors of a line of stages heretofore running on said Fifth avenue, from or about the year one thousand eight hundred and fifty up to and in the year one thousand eight hundred and eighty-five; and neither the said company nor its assigns, shall be authorized or permitted to demand or receive, for the transportation of any passenger over the aforesaid route, or its return, or any portion of either, a sum greater than five cents.

SECTION 3. This act shall take effect immediately.

131 PLAINTIFF'S EXHIBIT C.

Fifth Avenue Transportation Company (Ltd.).

Property Owners' Consent to Operation of Route.

EXHIBIT "A."

The undersigned, owners of property situate upon Fifth Avenue and South Fifth Avenue, between Bleecker Street and Eighty-second Street, in the City of New York, do hereby consent that a privilege or authority to run or operate stages or omnibuses, of the pattern of the low French omnibus or wagonette, be granted to the Fifth Avenue Transportation Company (Limited), by the Common Council of the said City, in and upon a route on said Fifth Avenue and South Fifth Avenue and through Washington Park, between said Bleecker Street and Eighty-second street.

This consent in writing is given in compliance with the provisions of Section 1947 of the "New York City Consolidation Act of 1882."

J. H. Gautier, 32 Fifth Avenue, 118 feet.
C. B. Sutton, 239 Fifth Avenue, 26 feet 6 inches.
Mr. John Wm. Hamersly, 255 Fifth Avenue.
Levi P. Morton, 503 Fifth Avenue.
R. L. Cutting, 141 and 145 Fifth Avenue.
H. M. Flagler, 685 Fifth Avenue, 28 feet 6 inches frontage.
Wm. Rockefeller, 689 and 691 Fifth Avenue, 50 feet 5 inches.
Benj. Brewster, 695 Fifth Avenue, 25 feet.
Mrs. S. R. Butler, 433 Fifth Avenue, 25 feet.
Morris H. Henry, 581 Fifth Avenue.
Mrs. J. D. Goin, 582 Fifth Avenue, 25 feet.

Pierre Lorillard, 389 Fifth Avenue.
John Sloane, 997 Fifth Avenue, 34 feet 6 inches.
J. A. Lowery, 314 Fifth Avenue.
L. A. Griswold, by F. Gray Griswold, Attorney, 91 Fifth Avenue.
132 Louis A. Sayre, M. D., 285 Fifth Avenue.
John R. Ford, 507 Fifth Avenue, 288 feet.
Wm. Barclay Parsons, 505 Fifth Avenue, 37 feet.
Geo. L. Kingsland, executor, 114 Fifth Avenue, 46 feet.
Caroline E. Johnson, by H. A. Johnson, 416 Fifth Avenue, 26 feet.
Effingham Townsend, 120 Fifth Avenue.
Lawrence Kip, 452 Fifth Avenue, 33 feet.
Mrs. R. S. Clark, 450 Fifth Avenue.
W. H. Webb, Fifth Avenue and Forty-second Street, 75 feet front on Fifth Avenue.
Estate of Thomas T. Sturgis, Fifth Avenue, Forty-second and Forty-third Streets, 37½ feet front.
T. T. Sturgis, executor.
Hawk & Wetherbee, Windsor Hotel.
J. J. Belvin, Windsor Hotel.
H. H. Van Dyck, 501 Fifth Avenue.
Estate of D. C. Kingsland, 116 Fifth Avenue, 46 feet.
Countess Sala, by Samuel L. M. Barlow, agent, 138 Fifth Avenue.
Roswell P. Flower, 597 Fifth Avenue.
Robert Bonner, Fifth Avenue from Fifty-sixth to Fifty-seventh Street, east side.
Emma Keep Schley, 601 Fifth Avenue.
Henry Bergh, 429 Fifth Avenue and 172 Fifth Avenue.
D. O. Mills, 634 Fifth Avenue.
H. R. Bishop, 881 Fifth Avenue.
Ogden Mills, Fifth Avenue and Sixty-ninth Street.
Pottier & Stymus, Manufacturing Co., 489 Fifth Avenue.
Calvin S. Brice, 693 Fifth Avenue.
Mrs. G. A. Osgood, 25 feet, 697 Fifth Avenue.
Christopher Meyer, 42 feet front, 617 Fifth Avenue; 100 feet Seventy-fifth and Seventy-sixth Streets, lots.
S. A. Main, 25 feet, 666 Fifth Avenue.
J. W. Clowes, 17 feet 8½ inches, 667 Fifth Avenue.
133 V. K. Stevenson, Fifth Avenue, southeast corner Fifty-ninth Street, and six lots Fifth Avenue and Seventy-ninth Street, six lots.
Mrs. Mary Stuart, 871 Fifth Avenue, 105 feet, 154 Fifth Avenue, 90 feet.
David Dows, corner Fifth Avenue and Sixty-ninth Street.
C. Vanderbilt, 1 West 57th Street.
M. C. Wilson, 511 Fifth Avenue, 63 feet.
Charles C. Delmonico, 212 Fifth Avenue, 75 feet.
E. Frank Coe, 668 Fifth Avenue, 25 feet.
Mrs. S. I. Torrance, 379 Fifth Avenue.
J. J. Astor, 338 and 327 Fifth Avenue.

W. W. Astor, 338 and 390 Fifth Avenue.
Samuel D. Babcock, 636 Fifth Avenue.
August Belmont, 109 Fifth Avenue.
Henry Hilton, for C. M. Stewart, Fifth Avenue and Thirty-fourth Street.
Black, Starr & Frost, 251 Fifth Avenue, 25 feet.
Cornelia Brady, 448 Fifth Avenue.
T. C. Lawrence, 267 Fifth Avenue, 30 feet.
H. Victor Newcomb, 683 Fifth Avenue.
C. F. Livermore, 225 and 227 Fifth Avenue, Hotel Brunswick.
James P. Kernochan, 384 Fifth Avenue.
C. A. Seward, 143 Fifth Avenue.
Amos R. Eno, 233 Fifth Avenue, on Fifth Avenue between Twenty-third and Twenty-fourth streets, 139 feet; Fifth Avenue, between Twenty-second and Twenty-third Streets, 133 feet, in all 300 feet front.
John S. Kennedy, 995 Fifth Avenue.
Catharine L. Brown, 514 Fifth Avenue.
W. J. Syms, 477 Fifth Avenue.
Hugh T. Dickey, 473 Fifth Avenue.
Watson E. Case, 471 Fifth Avenue, 26 feet 6 inches.
Orme Wilson, 414 Fifth Avenue.
George Bliss, 387 Fifth Avenue.
Eliza D. Harbeck, 260 Fifth Avenue.
Robert Lenox Kennedy, 99 feet, 41 Fifth Avenue.
134 S. E. Nash, 290 Fifth Avenue, 25 feet.
Simon Wormser, 836 Fifth Avenue, between Sixty-fourth and Sixty-fifth street-, 25 by 100 feet.
Estate of Peter Moller, by Charles G. Moller, Executor, between Sixty-third and Sixty-fourth Streets, 100 feet front.
Sidney Dillon, Seventy-sixth Street and Fifth Avenue, 102 feet.
Russell Sage, 506 Fifth Avenue, 26 feet.
Jay Gould, 579 Fifth Avenue.
J. Jones, 246 Fifth Avenue.
George N. Miller, 39 Fifth Avenue, 55 feet.
P. Van Valkenburgh, 508 Fifth Avenue.
Mrs. Ann K. Miller, 518 Fifth Avenue.
Thomas Morrell, 572 Fifth Avenue.
Chauncey Kilmer, 9 East 57th Street.
F. G. Whitney, 2 West Fifty-seventh Street, 75 feet.
Chr. H. Contoit, 728 Fifth Avenue, 27 feet.
Charles B. Ferrin, Hotel St. Mark, 45 feet.
John H. Hall, 559 Fifth Avenue, 25 feet.
John H. Hall, southeast corner Fifth Avenue and Eighty-second Street, 102 feet.
John H. Watson, southeast corner Fifth Avenue and Fifty-third Street, 25 x 100 feet.
John H. Watson, southeast corner Fifth Avenue and Seventy-seventh Street, 27½ x 120.
A. W. & T. Hume, 229 and 499 Fifth Avenue, 21 feet and 16 feet 9 inches.

Henry Knickerbocker, corner Sixty-fourth Street and Fifth Avenue, 100 x 200 feet.
Robert G. Remsen, 87 Fifth Avenue, 29 feet 10 inches.
Benjamin F. Dawson, 3 Fifth Avenue.
Paulina A. Morgan, 27 Fifth Avenue.
Estate Marcus P. Woodruff, per Marcus P. Woodruff, Trustee, 3 Fifth Avenue, 27 feet.
E. J. Fales, 383 Fifth Avenue.
D. H. Arnold, 382 Fifth Avenue.
Eliza A. Titus, 375 Fifth Avenue.
Marietta R. Stevens, 244 Fifth Avenue, Victoria Hotel.
135 Marietta R. Stevens, Executrix, 130 feet, Thirty-seventh Street corner Fifth Avenue, 100 feet, Forty-fourth Street corner Fifth.
David L. Haight, southeast corner of Fifth Avenue and Fifteenth Street, 80 feet on Fifth Avenue.
W. W. Tompkins, 68 Fifth Avenue.
Mrs. Henry R. Remsen, 44 Fifth Avenue.
Mrs. Steven R. Roe, 40 Fifth Avenue.
T. Mattack Cheesman, 240 Fifth Avenue.
Mrs. James Scott, 590 Fifth Avenue, 27 feet 6 inches.
T. C. Eastman, corner 68th Street and Fifth Avenue, 60 feet 3 inches.
Thomas Rutter, 814 Fifth Avenue.
Frances E. Lake, 815 Fifth Avenue.
A. C. Downing, 860 Fifth Avenue, 40 feet.
J. A. Bostwick, 800 Fifth Avenue, 30 feet.
Charles A. Baudouine, 264 Fifth Avenue and 718 Fifth Avenue 58 feet.
C. F. Chickering, 5 Fifth Avenue.
Chickering & Sons, 130 Fifth Avenue.
M. S. Van Buren, Fifth Avenue, between Thirteenth and Fifteenth Streets, 200 feet.
George W. Cullum, 426 Fifth Avenue.
Estate of C. A. Schuchardt, J. N. Platt, Executor, 287 Fifth Avenue.
Joseph Graften, per J. N. Platt, Attorney, 307 Fifth Avenue.
Samuel S. Sands and B. Aymar Sands, Trustees, 80 Fifth Avenue.
Samuel S. Sands, per B. A. S., 385 Fifth Avenue.
R. G. Dun, 100 feet, corner Eighty-first Street and Fifth Avenue.
Miss Elizabeth Aymar, per B. Johnson, Jr., 102 Fifth Avenue.
Bradish Johnson, per B. Johnson, Jr., 147 & 149 Fifth Avenue.
Robert Goelet, per Robert G. Roberts, Attorney, southeast corner Fifth Avenue and Forty-eighth Street, 50 feet.
136 Ogden Goelet, per Robert G. Roberts, Attorney, southwest corner Fifth Avenue and Forty-ninth Street, 50 feet.
Robert Goelet and Ogden Goelet, per Robert G. Roberts, Attorney, northeast corner Fifth Avenue and Forty-eighth Street, 20 feet.
Louisa M. Gerry, Executrix and Trustee, per Robert J. Livingston, Attorney, northwest corner Fifth Avenue and Forty-second Street, 100 feet 5 inches.

Robert J. Livingston, 184 Fifth Avenue, 37 feet 1½ inches.
William Astor, 350 Fifth Avenue, and 50 feet adjoining.
Philip Kissam, Trustee, 328 to 334 Fifth Avenue, four houses.
Park & Tilford, 789 and 791 Fifth Avenue.
James Renwick, 21 Fifth Avenue.
C. P. Huntington, five lots corner Seventy-second Street.
C. P. Huntington, three lots corner Eightieth Street.
Mrs. W. S. Gurnee, by W. S. Gurnee, corner Fiftieth Street, about 36 feet on Fifth Avenue.
Charles R. Purdy, Fifth Avenue, between Fifty-second and Fifty-third Streets, 115 feet.
F. W. Vanderbilt, corner Fortieth Street and Fifth Avenue, 52 feet.
Daniel Butterfield, 394 Fifth Avenue.
George Kemp, 720 Fifth Avenue, about 189 feet.
William Quinn for trustees of St. Patrick's Cathedral, 200 feet on Fifth Avenue.
Estate of William C. Rhinelander, deceased, Lispenard Steward, Trustee, from North Washington Square to 6 Fifth Avenue.
Mrs. L. Stewart, 6 Fifth Avenue.
W. Butler Duncan, 1 Fifth Avenue.
Edward Cooper, Fifth Avenue, from Washington Square north to Washington Alley.
John Taylor Johnson, 8 Fifth Avenue.
Susan Endicott Roberts, 107 Fifth Avenue.
William P. Draper, 604 Fifth Avenue, 50 feet.
137 Ambrose Snow, President for Trustees of S. S. Harbor.
William Belden, 810 Fifth Avenue.
Mary M. Stewart, 811 Fifth Avenue.
A. Raymond, 726 Fifth Avenue.
A. C. Kingsland, 135 Fifth Avenue.
Isaac Walker, 275 Fifth Avenue.
T. B. Coddington, 42 Fifth Avenue.
Rachel L. Kennedy, 41 Fifth Avenue.
Mary Mason Jones, 200 feet, Fifty-seventh and Fifty-eighth Streets.
Edward Kemp, 722 Fifth Avenue.
Allen Dodworth, 681 Fifth Avenue.
Warren C. Beach, 585 Fifth Avenue.
Joseph W. Harper, Jr., 562 Fifth Avenue, only on condition that conductors accompany the omnibuses.
Adelaide Howland, 420 Fifth Avenue.
Gordon Norrie, 377 Fifth Avenue.
Estate of Adam Norrie by G. N., executor, 303 Fifth avenue.
Margaret Moke by G. Norrie, attorney, 253 Fifth Avenue.
Buchanan Winthrop, 279 Fifth Avenue.
Alfred M. Hoyt, 934 Fifth Avenue.
Julia S. Delafield; Emily P. Delafield, by L. L. Delafield, Attorney, 475 Fifth Avenue.
Robert F. Bixby, northeast corner Fortieth Street and Fifth Ave-

nue, and northeast corner Thirty-ninth Street and Fifth Avenue, about 110 feet in all.

Helen Langdon, 200 feet, Fifty-fifth to Fifty-sixth Street.

Mary A. Wray, 746 Fifth Avenue.

Stephen Thorne, 750 Fifth Avenue.

H. Durkee, 714 Fifth Avenue.

Henry H. Cook, Fifth Avenue, Seventy-eighth and Seventy-ninth Streets.

Mrs. Irad Hawley, 47 Fifth Avenue.

Mrs. C. N. Talbot, 62 Fifth Avenue.

W. M. Peckham, 31 Fifth Avenue.

Mrs. D. H. Turner, 325 Fifth Avenue.

138 R. Fulton Cuttin, 724 Fifth Avenue.

Mrs. W. F. Coles, 677 Fifth Avenue.

Reuben Ross, 669 Fifth Avenue.

Henry F. Spaulding, 628 Fifth Avenue.

Frederick Gallatin, 670 Fifth Avenue.

H. B. Plant, 586 Fifth Avenue.

H. B. Plant, Fifth Avenue.

Thomas Slocomb, 220 Fifth Avenue.

F. O. Matthiessen, 580 Fifth Avenue.

D. H. McAlpin, 673 Fifth Avenue.

Estate of J. G. Mills by W. F. Gilchrist, agent, 853 Fifth Avenue.

M. L. Dehon, 224 Fifth Avenue, Twenty-eighth Street.

C. M. Goodrige, by C. V. Sidell, Attorney, 250, 293-297 and 299 Fifth Avenue, about 115 feet.

St. Luke's Hospital, by Henry A. Oakley, Chairman of Executive Committee, Fifth Avenue front between Fifty-fourth and Fifty-fifth Streets, west side.

Henry A. Oakley, 20 Fifth Avenue.

Thos. A. Davies, 610 Fifth Avenue.

Henry A. Cram, 5 East Thirty-eighth Street, 100 feet at Sixty-second Street, 100 feet at One Hundred and Thirty-ninth Street.

Fr. Beck, 281 Fifth Avenue, corner Thirtieth Street.

Jennet L. Belknap, executrix, by R. L. Belknap, Attorney, 49 Fifth Avenue.

W. K. Vanderbilt, 100 feet Fifty-second to Fifty-third Street, 660 Fifth Avenue.

Edward N. Strong, by Wm. H. Ross, agent, 29 Fifth Avenue.

Samuel P. Avery, 86 and 88 Fifth Avenue.

H. E. Merriam, 312 Fifth Avenue.

H. E. Merriam, also Fifth Avenue, between Eighty-third and Eighty-fourth streets.

Henrietta A. Lenox, per, 53, 55, 57 Fifth Avenue, about 150 feet.

Robert L. Maitland, Fifth Avenue, between Seventy-first and Seventy-second Streets, 200 feet.

Andrew S. Thorpe, 97 Fifth Avenue.

139 Mrs. William H. Fogg, 359 Fifth Avenue.

Robert E. Livingston, 127, 271 Fifth Avenue.

Robert E. Livingston, 77th Street, 25 feet front on Fifth Avenue.

Edwards Pierrepont, 105 Fifth Avenue.

T. Galliard Thomas, M. D., 294 Fifth Avenue.
C. W. Bell, 320 Fifth Avenue.
J. A. Bell, 276 Fifth Av-nue.
E. S. Higgins, 137 Fifth Avenue.
Mary Pettigrew, 256 Fifth Avenue.
T. B. Burnham, 124, 126, 128 Fifth Avenue.
John Mack, 368 Fifth Avenue.
E. E. Marcy, M. D., 396 Fifth Avenue.
D. Stewart, 322 Fifth Avenue.
B. H. Van Auken, Jr., 421 Fifth Avenue.
L. K. Hoy, 392 Fifth Avenue.
L. K. Hoy, 152 Fifth Avenue.
Joseph Naylor, 12 East Ninth Street.
Nathan Bozeman, M. D., 296 Fifth Avenue.
George W. Bell, 438, 4316 Fifth Avenue.
Henry A. Robbins, 419 Fifth Avenue.
Charles G. Landon, 428 Fifth Avenue.
H. Mortimer Brooks, 522 Fifth Avenue.
Egbert Guernsey, M. D., 526 Fifth Avenue.
Isaac V. Brokaw, 528 Fifth Avenue.
Dulcina P. Mowry, 534 Fifth Avenue.
Charles Van Glahn, 546 Fifth Avenue.
Henry Marks, 550 Fifth Avenue.
Wm. C. Browning, 552 Fifth Avenue.
R. M. Strebeigh, 7 East Forty-fifth Street.
Sarah U. Smith, 537 Fifth Avenue.
Anna M. Lamont, 555 Fifth Avenue.
Robert T. Hoy, 557 Fifth Avenue.
J. B. Ireland, 15 East Forty-seventh Street.
H. M. Schieffelin, 665 Fifth Avenue.
Wm. B. Oliver, Jr., 675 Fifth Avenue.
T. W. Durvee, 969 Fifth Avenue.
Ambrose E. Ely, Executor Israel Corse, 104 Fifth Avenue.
Arthur Leary, 90 Fifth Avenue.
J. F. Schenck for 323 Fifth Avenue.
Julia A. Chase, 401, 273 Fifth Avenue.

140 THE CITY OF NEW YORK:

I, P. J. Scully, Clerk of the said City, Do Certify, that I have compared the preceding with the Bound Volume XIII, Part IV, page 2810, of the City Record under dates from October 1st, to December 31, 1885, on file in my office, and that the same is a correct transcript therefrom.

In witness whereof, I have hereunto subscribed my name and affixed my official seal this 4th day of December, 1907.

[SEAL.] P. J. SCULLY, *Clerk.*

Plaintiff's Exhibit D.

Fifth Avenue Transportation Co. (Ltd.).

Chapter 182, Laws of 1889.

An Act to authorize the Fifth Avenue Transportation Company (Limited), or its assigns to run stages from the Bleecker Street Elevated Railway station on South Fifth avenue, in the city of New York, through South Fifth avenue, Canal and West streets to the Desbrosses street ferry and return, and also from Fifth avenue through Thirteenth street, University place and Ninth street to Broadway and return.

Became a law without the approval of the Governor, in accordance with the provisions of Article IV, Section 9 of the Constitution, April 24, 1889. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

141 Section 1. That the Fifth Avenue Transportation Company (Limited), a corporation organized under the laws of the State of New York, and its assigns, be and are hereby authorized, with the consent of the Commissioners of the sinking fund of the city of New York, and on such terms as they may prescribe, to run, drive, or cause to be run and driven, and without further authority from said city, a line of stages or carriages for the transportation of passengers and parcels for hire, from the terminus of its present route at the Bleecker Street Elevated Railway station on South Fifth avenue, through said South Fifth avenue to Canal street, thence through Canal and West streets to the Desbrosses street ferry and return, and also from its present route on Fifth avenue through Thirteenth street to University place, through University place to Ninth street, and along Ninth street to Broadway and return by the same route to Fifth avenue, in addition to the route now occupied by said Fifth Avenue Transportation Company (Limited), under and pursuant to chapter five hundred and thirty-six of the laws of one thousand eight hundred and eighty-six, from said Bleecker street station through South Fifth avenue, Washington square and Fifth avenue to Eighty-ninth street and return.

§ 2. This act shall take effect immediately.

142 PLAINTIFF'S EXHIBIT E.

Order Appointing Receiver.

The Fifth Avenue Transportation Company, Limited.

At a Special Term of the Supreme Court of the City of New York, held at the Court House in the City of New York, on the 7th day of February, 1895.

Present: Hon. Geo. L. Ingraham, Justice.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiffs,
against
THE FIFTH AVENUE TRANSPORTATION COMPANY, LIMITED,
Defendant.

The summons and complaint in this action having been duly served on the defendant, the Fifth Avenue Transportation Company, Limited, and said defendant having duly appeared herein, by Mr. William Irwin, its attorney, and offered to allow judgment to be taken against it for the relief prayed for in the complaint herein:

Now, upon reading and filing said summons and com-
143 plaint, notice of appearance and offer of judgment made herein, and the affidavit of Russel Raymond, and the acceptance of the offer of judgment; and on motion of Mr. Theodore E. Hancock, Attorney-General, Mr. William Irwin, attorney for the defendant appearing and consenting thereto,

It is adjudged and decreed, that the defendant, the Fifth Avenue Transportation Company, Limited, be and the same is hereby dissolved, and its corporate rights, privileges and franchises forfeited, and that a full and just distribution of its property and of the proceeds thereof among its fair and honest creditors in the order and in the proportion prescribed by law, be had.

And it is further adjudged and decreed that the defendant, the Fifth Avenue Transportation Company, Limited, its trustees, directors, managers and other officers, attorneys and agents be, and each of them hereby is forever restrained and enjoined from exercising any of the corporate franchises, powers, rights and privileges of the defendant, and from collecting or receiving any debts or demands belonging to or held by the defendant, and from paying out or in any manner interfering with, transferring or delivering to any person, any of the deposits, moneys, securities, property or effects of the defendant or held by it.

It is further adjudged and decreed that Daniel T. Hoag be, and he hereby is appointed Receiver of all the property, things in action and effects, real and personal, of the said corporation, the Fifth
Avenue Transportation Company, Limited, and of all the
144 property held by it, with the usual powers and duties enjoyed and exercised by Receivers, according to the practice of this Court, and of the statutes in such cases made and provided.

It is also adjudged and decreed that before entering upon the duties of his trust, such Receiver execute and file with the Clerk of New York County, a bond, with at least two sufficient sureties, to the People of the State of New York, in the penal sum of fifty thousand dollars, conditioned for the faithful discharge by said Receiver of the duties of his trust, such bond to be approved as to its sufficiency, form and manner of execution, by a justice of the Supreme Court, after due notice of the time and place of application for such approval has been first given to the Attorney-General of the State of New York. Upon the filing of such bond thus approved, the said Receiver is authorized to take possession of and sequestrate the property, things in action and effects, real and personal, of the defendant herein, and to take and hold all the property held by or in possession of said defendant corporation.

It is further adjudged and decreed that such further application may be made to this Court under the provisions of this decree or order, as the Receiver may be advised is proper and necessary for his instruction in the management and conduct of his trust.

It is further adjudged and decreed that no application shall be made to any Court, nor shall any action of the Court be asked
145 or suffered by the Receiver relative to or in any way connected with the duties of said Receiver, or the funds or assets of the defendant above mentioned, or their transfer, sale or delivery, unless notice of such application be first given to the Attorney-General of the State of New York, and copies of all orders made or procured shall be promptly served on the Attorney-General, as required by law.

It is further adjudged and decreed that all money of said defendant be immediately deposited by said Receiver in the United States Trust Company, to the credit of said Receiver, to be held by last-mentioned Trust Company subject to the further order of the Court, and said moneys so deposited as aforesaid, with said United States Trust Company, shall not be delivered over by it, except subject to and in pursuance of the order of this Court.

And it is further ordered that all persons whomsoever, and especially creditors of said defendant, be enjoined and restrained from commencing any action or proceeding against said defendant, or from taking any further proceedings in any action or proceeding already commenced.

And it is further adjudged that the plaintiff recover of the defendant, the Fifth Avenue Transportation Company, Limited, the sum of one hundred dollars cost and disbursements of this action, which said sum the said Receiver is hereby directed to pay to the Attorney-General.

Enter.

G. L. I., *J. S. C.*
HENRY D. PURROY, *Clerk.*

146 STATE OF NEW YORK,
County of New York, ss:

I, Peter J. Dooling, Clerk of the said County and Clerk of the Supreme Court of said State for said County, Do Certify, that I have compared the preceding with the original judgment on file in my office, and that the same is a correct transcript therefrom, and of the whole of such original.

Indorsed Filed. Feb. 7, 1895. 3 h 25 m.

In witness whereof, I have hereunto subscribed my name and affixed my official seal this 29th day of Nov. 1907.

[SEAL.] PETER J. DOOLING, *Clerk.*

147 PLAINTIFF'S EXHIBIT F.

Fifth Avenue Transportation Company (Limited).

Order Requiring Receiver to Operate Route.

At a Special Term of the Supreme Court, held at the Court House in the City of New York, on the 11th day of February, 1895.

Present: Hon. George L. Ingraham, Justice.

In the Matter of DANIEL T. HOAG, Receiver of the Fifth Avenue Transportation Company, Limited.

On the pleadings and proceedings in this action, and upon the petition of Daniel T. Hoag, Receiver and the affidavit of Howard Scribner, and on hearing Addison Atwater, Esq., of counsel for the Receiver, and on hearing Mr. Charles M. Francis, Assistant Attorney General, and Mr. William Irwin, of counsel for the defendant, the Fifth Avenue Transportation Company, Limited, it is, by the Court,

Ordered, That the prayer of said petitioner be granted; and that the said Receiver be, and he hereby is, authorized, as such Receiver,

148 to continue the running of the stage line of said corporation and the vehicles for hire for passengers on special occasions, until the sale of the right to run such stages and stage line be had, or until the further order of the Court in the premises, and pay for the necessary supplies, and repair the harness and vehicles required and the shoeing of the horses; to hire and pay weekly such stablemen, drivers, inspectors, starters, foremen, manager, bookkeeper, and such other clerical force as may be requisite and necessary for that purpose; and that for making payments for these purposes and conducting said business, he is hereby authorized to keep and retain in his possession, as Receiver, from time to time, a sum not exceeding at any one time five thousand dollars.

Enter:

G. L. I., *J. S. C.*

STATE OF NEW YORK,
County of New York, ss:

I, Peter J. Dooling, Clerk of the said County and Clerk of the Supreme Court of said State for said County, Do Certify, that I have compared the preceding with the original order on file in my office, and that the same is a correct transcript therefrom, and of the whole of such original.

Indorsed Filed. Feb. 11, 1895.

In Witness Whereof, I have hereunto subscribed my name and affixed my official seal, this 29th day of Nov., 1907.

[SEAL.] PETER J. DOOLING, *Clerk.*

149 PLAINTIFF'S EXHIBIT G.

Fifth Avenue Transportation Company (Limited).

Order for Sale by Receiver.

At a Special Term of the Supreme Court held at Chambers at the County Court House in the City of New York on the 17th day of July, 1895.

Present: Hon. Martin L. Stover, Justice.

In the Matter of DANIEL T. HOAG, Receiver of the Fifth Avenue Transportation Company, Limited.

On reading and filing the petition of Daniel T. Hoag, Receiver of Fifth Avenue Transportation Company, Limited, verified the 12th day of July, 1895, and on the affidavits of Howard Scribner and Daniel T. Hoag, also verified on the 12th day of July, 1895, and proof of due service of the same and of a copy of this order upon Hon. Theodore E. Hancock, Attorney-General of the State of New York, and on hearing Addison Atwater, Esq., of counsel for said Receiver, and William Irwin, Esq., attorney for the said dissolved corporation, appearing and not opposing.

150 It is ordered that all the rights conferred on the Fifth Avenue Transportation Company, Limited, a dissolved corporation, by Chapter 536 of the Laws of the State of New York, passed June 2nd, 1886, and by Chapter 182 of the Laws of the State of New York, passed in the year 1889, and also all the other property of said dissolved corporation, be sold at public auction under the direction of Daniel T. Hoag, Receiver of said dissolved corporation, to the highest bidder as soon as conveniently may be.

It is further ordered that the sale of said rights and property shall be held at the Real Estate Exchange salesrooms, number 111 Broadway, in the City of New York; that said sale shall be duly advertised by a publication of a notice thereof in the Law Journal and in the Mail & Express, two newspapers published in the City of New York, at least twice a week for three weeks successively next preceding the day appointed by said Receiver for the taking place

of such sale, and the said Receiver is hereby authorized to further advertise the said sale in such manner as in his judgment may seem proper; and that the said rights and property shall be sold in accordance with the following terms of sale in two parcels, to wit: all the rights granted by Chapter 536, Laws of 1886; Chapter 182, Laws of 1889, and all the property described in the schedule annexed to the petition, except the lease therein described, in one parcel, and the lease in a separate and second parcel.

Terms of sale of the property of Fifth Avenue Transportation Company, Limited, to wit: the right acquired by and granted to said corporation by the acts of the Legislature of the State of New York,
to wit: Chapter 536 of the Laws of 1886 and Chapter 182
151 of the Laws of 1889, and also the horses, stages and other property used in the conduct of the business, and of which a schedule is annexed to the petition upon which the order of sale was made; and a copy hereto annexed, being all the property in the hands of the Receiver, except the lease mentioned in said order of sale.

1st. Ten per cent. of the purchase money of said property sold will be required to be paid to the Receiver, at the time and place of sale, for which the said Receiver's receipt will be given.

2nd. The residue of said purchase money will be required to be paid to the said Receiver at his office, 203 Broadway, in the city of New York, at twelve o'clock noon, on the day upon which the Receiver's deed of the said property sold will be ready for delivery, as hereinafter provided for.

3rd. The said Receiver is not required to send any notice to the purchaser; and if he neglects to call at the time and place specified above to complete his purchase, he will be charged with interest thereafter on the whole amount of the said purchase.

4th. The purchaser of said property will, at the time and place of sale, sign a memorandum of his purchase, and pay in addition to the purchase money the auctioneer's fees for the sale thereof.

5th. The sale of the said property is subject to the approval of the Court.

6th. The bidding will be kept open after the said property is struck down, and in case the purchaser shall fail to comply with any of the above conditions of sale, the property so struck down
152 to him will be again put up for sale under the direction of said Receiver, under the same terms of sale, without application to the Court, unless the Receiver's attorney shall elect to make such application, and such purchaser will be held liable for any deficiency there may be between the sum for which said property shall be struck down upon the sale, and that for which it may be purchased on the resale, and also for any costs or expenses accruing on such re-sale.

7th. Upon completing the sale, the Receiver will file with the Clerk of the Court his report thereof, under oath, containing the description of the property sold; and this sale is made subject to the confirmation thereof by order of the Court. Upon the entry of the order confirming such report, the Receiver's deed of the property will

be prepared by him, as hereinbefore provided, will be ready for delivery at his office at the expiration of ten days thereafter, or on one day's notice. In case the Receiver's report of sale shall not be confirmed, the 10% of the purchase money paid to the Receiver by the purchaser shall be refunded to such purchaser, and no other claim shall be made by the purchaser.

Memorandum of Sale.

has this
day of purchased the property described as
in the above annexed printed advertisement of sale, for the sum of dollars, and hereby promises and agrees
153 to comply with the terms and conditions of the sale of said property, as above mentioned and set forth.

Dated New York, , 1895.

New York, , 1895, received from the sum of dollars, being ten per cent. on the amount bid by for property sold by me under the order in this proceeding.

Terms of sale of the lease of the land and premises known by the street numbers 56 to 65 East Eighty-eighth street, New York City.

1st. Ten per cent. of the purchase money of said lease will be required to be paid to the Receiver, at the time and place of sale, for which the Receiver's receipt will be given.

2d. The residue of said purchase money will be required to be paid to the said Receiver at his office, No. 203 Broadway in the City of New York, at twelve o'clock noon, on the day upon which the said Receiver's assignment of said lease will be ready for delivery, as hereinafter provided for.

3d. The said lease is sold subject to the rents accruing thereon from the 31st day of January, 1895, and also to the taxes, assessments and water rates that may be now due on said premises, and also subject to the approval of the Court.

4th. The said Receiver is not required to send any notice to the purchaser; and if he neglects to call at the time and place above specified to receive his assignment of lease, he will be charged with interest thereafter on the whole amount of his purchase.

154 5th. The purchaser of said lease, will, at the time and place of sale, sign a memorandum of his purchase, and pay, in addition to the purchase money the auctioneer's fees for selling the same.

6th. The bidding will be kept open after the lease is struck down; and in case any purchaser shall fail to comply with any of the above conditions of sale, the lease so struck down to him will be again put up for sale under the direction of said Receiver under the same terms of sale, without application to the Court, unless the Receiver's attorney shall elect to make such application, and such purchaser will be held liable for any deficiency there may be between the sum for which said lease shall be struck down upon the sale, and that

for which it may be purchased on the re-sale, and also for any costs or expenses accruing on such re-sale.

7th. Upon completing the sale, the Receiver will file with the Clerk of the Court his report thereof, under oath, containing the description of the lease sold; and this sale is made subject to the confirmation thereof by order of the Court. Upon the entry of the order confirming such report, the Receiver's Assignment of the lease will be prepared by him, and, as hereinbefore provided, will be ready for delivery at his office at the expiration of ten days thereafter, or on one day's notice. In case the Receiver's report of sale shall not be confirmed, the 10% of the purchase money paid to the Receiver by the purchaser shall be refunded to such purchaser, and no other claim shall be made by the purchaser.

155 *Memorandum of Sale.*

has this day of , purchased the property described as in the above annexed printed advertisement of sale, for the sum of dollars, and hereby promises and agrees to comply with the terms and conditions of the sale of said Lease, as above mentioned and set forth.

Dated New York, 1895.

New York, 1895, received from the sum of dollars, being ten per cent. on the amount bid by for the lease sold by me under the order in this proceeding.

It is further ordered that upon completing the sale of said rights and property the Receiver shall file with the Clerk of the Court his report thereof under oath, and that the said Receiver shall, upon said report, apply to the Court for an order confirming such sale, and for such other and further relief as to the Court may seem right and proper.

Enter:

M. L. S., *J. S. C.*

STATE OF NEW YORK,
County of New York, ss:

I, Peter J. Dooling, Clerk of the said County and Clerk of the Supreme Court of said State for said County, Do Certify, that I have compared the preceding with the original order on file
156 in my office, and that the same is a correct transcript therefrom, and of the whole of such original.

Indorsed, Filed and Recorded July 18, 1895.

In witness whereof, I have hereunto subscribed my name and affixed my official seal, this 29th day of November, 1907.

[SEAL.] PETER J. DOOLING, *Clerk.*

PLAINTIFF'S EXHIBIT H.

Fifth Avenue Transportation Company (Limited).

Report of Sale.

Supreme Court, County of New York.

In the Matter of DANIEL T. HOAG, Receiver of Fifth Avenue Transportation Company, Limited.

Report of Sale.

To the Supreme Court:

In pursuance of an order of this Court in this proceeding, bearing date the seventeenth day of July, 1895, whereby it was
157 ordered that all rights conferred on the Fifth Avenue Transportation Company, Limited, a dissolved corporation, by Chapter 536 of the Laws of the State of New York, passed June 2, 1886, and by Chapter 182 of the Laws of the State of New York, passed in the year 1889, and also all the other property of said dissolved corporation, be sold at public auction under the direction of Daniel T. Hoag, Receiver of said dissolved corporation, to the highest bidder as soon as conveniently may be; and whereby it was further ordered that the sale of said rights and property shall be held at the Real Estate Exchange Salesrooms, No. 111 Broadway, in the City of New York; whereby it was further ordered that said sale shall be duly advertised by a publication of a notice thereof in the Law Journal and in the N. Y. Mail and Express, two newspapers published in the City of New York, at least twice a week for three weeks successively next preceding the date appointed by said Receiver for the taking place of such sale, and the said Receiver is thereby authorized to further advertise the said sale in such manner as in his judgment may seem proper; and that the said rights and property shall be sold in accordance with the terms of sale, copies of which are hereto annexed, in two parcels, to wit: all the rights granted by Chapter 536, Laws of 1886; Chapter 182, Laws of 1889, all the property described in the schedule annexed to the petition for sale, except the lease therein described, in one parcel, and the lease in a separate and second parcel.

And whereby it was further ordered that upon completing the sale of said rights and property the said Receiver shall file
158 with the Clerk of this Court, his report thereof under oath; I, Daniel T. Hoag, Receiver of said dissolved corporation, do report:

That I caused notice of the time and place of the sale of the rights and property mentioned in said order, containing a brief description thereof, to be published in the New York Law Journal and in the N. Y. Mail and Express, the two newspapers directed by said order, twice a week successively, commencing the 22d day of July,

1895, and continuing said publication until the 21st day of August, 1895, the time mentioned in said notices when said sale should take place, copies of which notices of sale are hereto annexed, together with proof by affidavit of the said publication; that on the said 21st day of August, 1895, I publicly, by Smyth and Ryan, auctioneers, at the hour of 12 o'clock, noon, at the Real Estate Exchange Salesrooms, No. 111 Broadway, in the city of New York, adjourned said sale until the 12th day of September, 1895, at the same hour and place; that I caused notices of said sale with an announcement of the said adjournment thereof to be further published in the New York Law Journal and N. Y. Mail and Express aforesaid, the two newspapers directed by said order, twice a week successively, from the said 21st day of August, 1895, until said 12th day of September, 1895, copies of which said notices of sale and adjournment, together with proof by affidavit of the said publication, are hereto annexed; that on said 12th day of September, 1895, I publicly, by Smyth and Ryan, auctioneers, at the hour of twelve o'clock, noon, at the said Real Estate Exchange Salesrooms, No. 111 Broadway, in the city of New York, further adjourned said sale until the 3rd day of
159 October, 1895, at the same hour and place; that I caused notices of said sale with an announcement of the said adjournments thereof to be further published in the New York Law Journal and in the N. Y. Mail and Express, the two newspapers directed by said order, twice a week successively from the said 12th day of September, 1895, until said 3rd day of October, 1895, copies of which said notices of sale and adjournments are hereto annexed, together with proof by affidavit of the said publications; that on said third day of October, 1895, I publicly, by Smyth and Ryan, auctioneers, at the hour of 12 o'clock, noon, at the said Real Estate Exchange Salesrooms, No. 111 Broadway, in the city of New York, further adjourned said sale until the 17th day of October, 1895, at the same hour and place; that I caused notices of said sale with an announcement of the adjournments thereof to be further published in the New York Law Journal and in the N. Y. Mail and Express aforesaid, the two newspapers directed by said order, twice a week successively, from the 3rd day of October, 1895, until the said 17th day of October, 1895, copies of which said notices and adjournments are hereto annexed, together with proof by affidavit of the said publications.

And agreeable to said public notices and adjournments I did, at the time and place specified therein, to wit: on the 17th day of October, 1895, at noon, attend at the Real Estate Exchange Salesrooms, No. 111 Broadway, in the City of New York, and by Smyth and Ryan, auctioneers, exposed said rights and property in two parcels for sale at public auction to the highest bidder as directed by said order.

160 And I further report that all the rights granted by Chapter 536, Laws of 1886; Chapter 182, Laws of 1889, and all the property described in the schedule annexed to the petition for the said order of sale thereof, except the lease therein described, were then and there fairly struck off and sold in one parcel to Ward

Campbell for ten thousand two hundred and fifty dollars, he being the highest bidder therefor, and that being the highest sum bid for the same.

And I further report that the lease mentioned in the schedule of property belonging to the said dissolved corporation, annexed to the petition for the said order of sale thereof, to wit: of the land and premises known by the street numbers 55, 57, 59, 61, 63 and 65 West Eighty-eighth street in the City of New York, was then and there fairly struck off and sold in a separate and second parcel to Ward Campbell, for two hundred dollars, he being the highest bidder therefor, and that being the highest sum bid for the same.

That the terms of sale were made known to the persons attending said sale previous to putting up said parcels of property, and that copies of the said terms of sale are hereto annexed.

And I further report that the said Ward Campbell, then and there, paid me the sum of one thousand and twenty-five dollars, being ten per cent. of the purchase money of the first parcel of the said rights and property so sold; and the further sum of twenty dollars, being ten per cent. of the purchase money of the second parcel of the said property so sold, in accordance with the terms of sale, copies of which are hereto annexed; that I signed and delivered to him receipts in triplicate for the sums so paid to me on account of the said
161 purchase money aforesaid, one of each of said receipts are also hereto annexed; and that the said Ward Campbell further then and there signed in triplicate memorandums of sale to him of each of the parcels of property of the said dissolved corporation so sold, by which he, the said Ward Campbell, did acknowledge that he had purchased each of the parcels of property so sold as aforesaid for the sums above mentioned respectively, and promised and agreed to comply with the terms and conditions of sale applicable to each parcel of property of the said dissolved corporation so sold to him, and that one of each of the said memorandums of sale is hereto annexed, together with a copy of the terms of sale thereto appertaining.

All of which is respectfully submitted.

Dated New York, October 30, 1895.

DANIEL T. HOAG,
Receiver of Fifth Avenue Transportation Company, Limited.

STATE OF NEW YORK,
City and County of New York, ss:

Daniel T. Hoag, being duly sworn, deposes and says, that he is the Receiver of Fifth Avenue Transportation Company, Limited; that he has read the foregoing report of sale of the rights and property of Fifth Avenue Transportation Company, Limited, and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be alleged on
162 information and belief, and as to those matters he believes it to be true.

DANIEL T. HOAG.

Sworn to before me this 30th day of October, 1895.

CLARENCE GRADBY,
Notary Public, City and County of New York.

Terms of sale of the property of Fifth Avenue Transportation Company, Limited, to wit: The right acquired by and granted to said corporation by the acts of the Legislature of the State of New York, to wit: Chapter 536 of the Laws of 1886 and Chapter 182 of the Laws of 1889, and also the horses, stages and other property used in the conduct of the business, and of which a schedule is annexed to the petition upon which the order of sale was made; and a copy hereto annexed, being all the property in the hands of the Receiver, except the lease mentioned in said order of sale.

1st. Ten per cent. of the purchase money of said property sold will be required to be paid to the Receiver at the time and place of sale, for which the said Receiver's receipt will be given.

2nd. The residue of said purchase money will be required to be paid to the Receiver at his office, 203 Broadway, in the city of New York, at twelve o'clock, noon, on that day, upon which the Receiver's deed of the said property sold will be ready for delivery, as hereinafter provided for.

163 3rd. The said Receiver is not required to send any notice to the puchaser; and if he neglects to call at the time and place specified above to complete his purchase, he will be charged with interest thereafter on the whole amount of the said purchase.

4th. The purchaser of said property will, at the time and place of sale, sign a memorandum of his purchase, and pay in addition to the purchase money the auctioneer's fees for the sale thereof.

6th. The bidding will be kept open after the said property is struck down, and in case the purchaser shall fail to comply with any of the above conditions of sale, the property so struck down to him will be again put up for sale under the direction of said Receiver under the same terms of sale, without application to the Court, unless the Receiver's attorney shall elect to make such application, and such purchaser will be held liable for any deficiency there may be between the sum for which said property shall be struck down upon the sale and that for which it may be purchased on the re-sale, and also for any costs or expenses accruing on such re-sale.

7th. Upon completing the sale the Receiver will file with the Clerk of the Court his report thereof, under oath, containing the description of the property sold; and this sale is made subject to the confirmation thereof by order of the Court. Upon the entry of the order confirming such report, the Receiver's deed of the property will be prepared by him, as hereinbefore provided, will be ready for delivery at his office at the expiration of ten days thereafter, or on one day's notice. In case the Receiver's report of sale shall

164 not be confirmed, the 10% of the purchase money paid to the Receiver by the purchaser shall be refunded to such purchaser, and no claim shall be made by the purchaser.

Dated October 17, 1895.

DANIEL T. HOAG, *Receiver.*

Memorandum of Sale.

Ward Campbell has this day purchased the property described as the first lot in the above annexed printed advertisement of sale, for the sum of ten thousand two hundred and fifty dollars, and hereby promises and agrees to comply with the terms and conditions of the sale of said property, as above mentioned and set forth.

Dated New York, October 17th, 1895.

WARD CAMPBELL, *Purchaser.*

New York, October 17, 1895, received from Ward Campbell, the sum of one thousand and twenty-five dollars, being ten per cent. on the amount bid by him for property sold by me under the order in this proceeding, as mentioned above being lot one.

DANIEL T. HOAG, *Receiver.*

Executed in triplicate.

165 Terms of sale of the lease of the land and premises known by the street numbers 56 to 65 East Eighty-eighth street, New York City.

1st. Ten per cent. of the purchase money of said lease will be required to be paid to the Receiver, at the time and place of sale, for which the Receiver's receipt will be given.

2d. The residue of said purchase money will be required to be paid to the said Receiver at his office, No. 203 Broadway in the city of New York, at twelve o'clock noon, on the day upon which the said Receiver's assignment of said lease will be ready for delivery, as hereinafter provided for.

3d. The said lease is sold subject to the rents accruing thereon from the 31st day of January, 1895, and also to the taxes, assessments and water rates that may be now due on said premises, and also subject to the approval of the Court.

4th. The said Receiver is not required to send any notice to the purchaser; and if he neglects to call at the time and place above specified to receive his assignment of lease, he will be charged with interest thereafter on the whole amount of his purchase.

5th. The purchaser of said lease, will, at the time and place of sale, sign a memorandum of his purchase, and pay, in addition to the purchase money the auctioneer's fees for selling the same.

6th. The bidding will be kept open after the lease is struck down; and in case any purchaser shall fail to comply with any of the above conditions of sale, the lease so struck down to him will be again put up for sale under the direction of said Receiver under the
166 same terms of sale, without application to the Court, unless the Receiver's attorney shall elect to make such application, such purchaser will be held liable for any deficiency there may be between the sum for which said lease shall be struck down upon the sale, and that for which it may be purchased on the re-sale, and also for any costs or expenses accruing on such re-sale.

7th. Upon completing the sale, the Receiver will file with the

Clerk of the Court his report thereof, under oath, containing the description of the lease sold; and this sale is made subject to the confirmation thereof by order of the Court. Upon the entry of the order confirming such report, the Receiver's Assignment of the lease will be prepared by him, and, as hereinbefore provided, will be ready for delivery at his office at the expiration of ten days thereafter, or on one day's notice. In case the Receiver's report of sale shall not be confirmed, the 10% of the purchase money paid to the Receiver by the purchaser shall be refunded to such purchaser, and no other claim shall be made by the purchaser.

Dated October 17, 1895.

DANIEL T. HOAG, *Receiver.*

Memorandum of Sale.

Ward Campbell has this 17th day of October, 1895, purchased the property described as second lot in the above annexed printed advertisement of sale, for the sum of two hundred dollars 00-100, and hereby promises and agrees to comply with the terms
167 and conditions of the sale of said Lease, as above mentioned and set forth.

Dated, New York, October 17th, 1895.

WARD CAMPBELL, *Purchaser.*

NEW YORK, *October 17th*, 1895.

Received from Ward Campbell the sum of twenty 00-100 dollars, being ten per cent. on the amount bid by him for the Lease sold by me under the order in this proceeding.

DANIEL T. HOAG, *Receiver.*

Executed in triplicate.

[Filed October 30, 1895, in the office of the Clerk of the County of New York.]

168 PLAINTIFF'S EXHIBIT I.

Order Confirming Sale by Receiver.

Fifth Avenue Transportation Company, Limited.

At a Special Term of the Supreme Court, held at chambers in the County Court House, in and for the City and County of New York, on the eighteenth day of November, 1895.

Present: Hon. Abraham R. Lawrence, Justice.

In the Matter of DANIEL T. HOAG, Receiver of Fifth Avenue Transportation Company, Limited.

On reading and filing the report of sale of Daniel T. Hoag, Esq., Receiver of Fifth Avenue Transportation Company, Limited, ap-

pointed to sell the rights and all the property of said Fifth Avenue Transportation Company, Limited, by an order of this Court bearing date the seventeenth day of July, 1895, which report bears date the 30th day of October, 1895, and on filing proof of service of due notice of this motion on the Attorney-General of the State of New York, and on William Irwin, Esq., attorney of said dissolved corporation, and on Charles H. Strong, Esq., attorney of Ward
169 Campbell, the purchaser of said rights and property at the sale directed by said order.

Now, on motion of Addison Atwater, Esq., attorney for said Receiver, and on hearing Mr. Charles H. Strong for the purchaser not opposing,

It is ordered, adjudged and decreed, that the said report be and the same is hereby in all respects confirmed.

It is further ordered, adjudged and decreed, that the sales of all the rights and other property including the lease of the land and premises Numbers 55, 57, 59, 61, 63 and 65 West Eighty-eighth street, in the city of New York, to Ward Campbell be and the same hereby are in all respects ratified and confirmed.

It is further ordered, adjudged and decreed, (that on the payment of the balance of the purchase money bid by the said Ward Campbell for all the rights acquired by and granted to the Fifth Avenue Transportation Company, Limited, by the Acts of the Legislature of the State of New York, to-wit: Chapter 536 of the Laws of 1886, and Chapter 182 of the Laws of 1889, and also the horses, stages and other property used in the conduct of the business), and of which a schedule is annexed to the petition upon which the order of sale was made, being all the property in the hands of the Receiver, except the lease above mentioned, to the said Daniel T. Hoag, Receiver as aforesaid, in accordance with the terms of sale
170 thereof and the memorandum of sale thereof signed by the said Ward Campbell, on the seventeenth day of October, 1895, the said Daniel T. Hoag, Receiver as aforesaid, shall deliver to the said Ward Campbell or to his assigns an instrument in writing under his hand and seal assigning and transferring thereby all the said rights and property to the said Ward Campbell, the purchaser thereof, or to his assigns.

And it is further ordered, adjudged and decreed, that on the payment of the balance of the purchase money bid by the said Ward Campbell for the said lease bearing date the 20th day of December, 1889, made by Elliott F. Shepard to the said Fifth Avenue Transportation Company, Limited, recorded in New York Register's office on the second day of January, 1890, in Liber 2281 of Deeds, page 248, whereby the lessor let and rented unto said dissolved corporation the stables and offices and premises now occupied by the Receiver and formerly occupied by the said Fifth Avenue Transportation Company, Limited, in operating the business of said dissolved corporation, situated on the north side of East Eighty-eighth street, between Madison and Park avenues, and extending through to Eighty-ninth street, in the city of New York said stables and offices and premises being known by the street numbers 55, 57, 59, 61,

63 and 65 East Eighty-eighth street, for the term of twenty-one years from January 1st, 1890, at the yearly rental of $14,400 per annum, and taxes, assessments and water rates, payable quarterly in advance on every first day of February, May, August and November, subject to the rents accruing therefrom from the 31st day
171 of January, 1895, and also to the taxes, assessments and water rates that may be now due on said premises, to the said Daniel T. Hoag, Receiver as aforesaid, in accordance with the terms of sale thereof and the memorandum of sale thereof, signed by the said Ward Campbell on the seventeenth day of October, 1895, the said Daniel T. Hoag, Receiver as aforesaid, shall deliver an assignment of said lease under his hand and seal to the said Ward Campbell, the purchaser thereof, or to his assigns.

And it is further ordered, adjudged and decreed, that the said Ward Campbell, the purchaser of said rights, property and lease, or his assigns, upon completing his purchases thereof by the payment of the entire consideration moneys to the said Daniel T. Hoag, Receiver, be put into possession thereof, and that any person who is in possession of said property and premises, or either of them, deliver possession thereof to the said Ward Campbell or his assigns on production of said instruments in writing under the hand and seal of said Receiver transferring said rights, property and lease to the said Ward Campbell or to his assigns.

Enter,

ABM. R. LAWRENCE,
Justice S. C.

STATE OF NEW YORK,
County of New York, ss:

I, Peter J. Dooling, Clerk of the said County and Clerk of the Supreme Court of said State for said County, do certify, that I have compared the preceding with the original Order on file in
172 my office, and that the same is a correct transcript therefrom, and of the whole of such original.

Indorsed, Filed and Recorded, Nov. 19, 1895.

In witness whereof, I have hereunto subscribed my name and affixed my official seal this 29th day of Nov., 1907.

[SEAL.] PETER J. DOOLING, *Clerk.*

PLAINTIFF'S EXHIBIT J.

Fifth Avenue Transportation Company, Limited.

Bill of Sale of Lease, Receiver to Campbell.

Whereas, I the undersigned, Daniel T. Hoag, was heretofore appointed Receiver of all the property, things in action and effects, real and personal, of the Fifth Avenue Transportation Company, Limited, by a judgment of the Supreme Court, made at Special Term thereof, held in the County of New York on the 7th day of February,

1895, in a certain action, wherein The People of the State of New York were plaintiffs, and the said Fifth Avenue Transportation Company, Limited, was defendant;

And whereas, by order of the said Supreme Court, dated the 17th day of July, 1895, I was directed to sell in the manner in said order directed, along with other property, the lease hereinafter described, subject as in the terms of sale therefor is mentioned, and which terms are made part of said order, at public auction to the highest bidder at the Real Estate Exchange Salesrooms, No. 111
173 Broadway, in the City of New York;

And whereas, I did offer and sell, with other property, the said lease at public auction at the place and in the manner directed by said order on the 17th day of October, 1895, and at said sale said lease was knocked down to Ward Campbell, of the City of New York, for the sum of two hundred dollars, he being the highest bidder, and that being the highest bid for the same;

And whereas, as directed by said order, I made and filed my report of said sale to said Supreme Court, on the 30th day of October, 1895;

And whereas, thereafter, and on the 18th day of November, 1895, the said Supreme Court, by an order dated on that day, confirmed said report and sale, and directed me, as such Receiver, as aforesaid, on compliance by said Ward Campbell with said terms of said sale, to execute and deliver to the said Ward Campbell or his assigns an assignment of said lease, under my hand and seal, as such Receiver;

And whereas, the said Ward Campbell has complied with the terms of said sale, and has paid to me, as such Receiver, the said sum of two hundred dollars;

Now, therefore, know all men by these presents, That in compliance with and in pursuance of the directions of said order last hereinbefore mentioned and in consideration of the payment of said sum of two hundred dollars to me as such Receiver by
174 the said Ward Campbell, the receipt of which is hereby acknowledged, I, the said Daniel T. Hoag, as such Receiver as aforesaid, have sold, and by these presents do grant, convey, sell, assign, transfer and set over unto the said Ward Campbell said indenture of Lease bearing date the 20th day of December, 1889, made by Elliott F. Shepard to the said Fifth Avenue Transportation Company, Limited, and recorded in the office Register of the City and County of New York on the second day of January, 1890, in Liber 2281 of Conveyances, page 248, with all and singular the premises therein mentioned and described and the buildings thereon together with the appurtenances.

To have and to hold the same unto the said Ward Campbell, his executors, administrators and assigns from the day of the date hereof for and during all the rest, residue and remainder yet to come of and in the term of twenty-one years mentioned in said indenture of lease, subject nevertheless to the rents accruing thereon from the thirty-first day of January, 1895, and also to the taxes and assessments and water rates that may be now due on said premises, and

also subject to the rents, covenants, conditions and provisions in the said lease also mentioned.

In Witness Whereof, I have hereunto set my hand and affixed my seal as Receiver of said Fifth Avenue Transportation Company, Limited, this 26th day of November, one thousand eight hundred and ninety-five.

[SEAL.] DANIEL T. HOAG, *Receiver.*

Signed, sealed and delivered in presence of
JOSEPH R. GUERNSEY.

175 STATE OF NEW YORK,
City and County of New York, ss:

On this 26th day of November, 1895, before me personally appeared Daniel T. Hoag, to me known and known to me to be the person described in and who executed the foregoing instrument, and he acknowledged to me that he executed the same as the Receiver of the Fifth Avenue Transportation Company, Limited.

JOSEPH R. GUERNSEY,
Notary Public, City and County of New York.

[Rec., Sec. 5, Bl. No. 1500 of Conv., Liber 40, p. 5.]

PLAINTIFF'S EXHIBIT K.

Bill of Sale of Franchises and Property, Receiver to Campbell.

Whereas, I, the undersigned, Daniel T. Hoag, was heretofore appointed Receiver of all the property, things in action and effects, real and personal, of the Fifth Avenue Transportation Company, Limited, by a judgment of the Supreme Court made at Special Term thereof, held in the County of New York on the 7th day of February, 1895, in a certain action, wherein The People of the State of New York were plaintiffs, and the said Fifth Avenue Transportation Company, Limited, was defendant;

And whereas, by order of the said Supreme Court, dated the 17th day of July, 1895, I was directed to sell in the manner in
176 the said order directed, all the rights conferred on said Fifth Avenue Transportation Company, Limited, a dissolved corporation, by Chapter 536 of the Laws of the State of New York, passed June 2d, 1886, and by Chapter 182 of the Laws of the State of New York, passed in the year 1889, and also all the other property of said dissolved corporation, according to the terms of sale in said order mentioned at public auction to the highest bidder, at the Real Estate Exchange Salesrooms, No. 111 Broadway, in the City of New York.

And whereas, I did offer and sell all said rights and other property at public auction at the place and in the manner directed by said order on the 17th day of October, 1895, and at said sale all said rights and other property (except a certain lease bearing date the

20th day of December, 1889, made by Elliott F. Shepard to the said Fifth Avenue Transportation Company, Limited, recorded in the office of the Register of the City and County of New York, in Liber 2281, of Conveyances, page 248, which said lease was directed by said order to be sold in a separate parcel), was knocked down to Ward Campbell of the City of New York for the sum of ten thousand two hundred and fifty dollars, he being the highest bidder, and that being the highest sum bid for the same;

And whereas, as directed by said order, I made Court, on the 30th day of October, 1895.

And whereas, thereafter, and on the 18th day of November, 1895, the said Supreme Court, by an order dated on that day, confirmed said report and sale, and directed me, as such Receiver, as
177 aforesaid, on compliance by said Ward Campbell with said terms of said sale, to execute and deliver an instrument in writing, under my hand and seal, as such Receiver, assigning and transferring thereby all the said rights and property (except the lease above mentioned) to the said Ward Campbell, or to his assigns;

And whereas, the said Ward Campbell has complied with the terms of said sale, and has paid to me, as such Receiver, the said sum of ten thousand two hundred and fifty dollars;

Now, therefore, know all men by these presents, That, in compliance with and in pursuance of the directions of said order last hereinbefore mentioned and in consideration of the payment of said sum of ten thousand two hundred and fifty dollars to me as such Receiver by the said Ward Campbell, the receipt of which I hereby acknowledge, I, the said Daniel T. Hoag, as such Receiver as aforesaid, have sold, and by these presents do grant, convey, sell, assign and transfer unto the said Ward Campbell, all the right to run and drive, or cause to be run and driven, a line of stages or carriages for the transportation of passengers for hire from Eighty-ninth street in the City of New York, down Fifth avenue, across Washington Park, and along South Fifth avenue to the Bleecker street elevated station and return, together with all the rights granted to Fifth Avenue Transportation Company, Limited, or acquired by, under or by Chapter 535 of the Laws of 1886, and all the rights granted to or acquired by said Fifth Avenue Transportation Company, Limited, under or by Chapter 182 of the Laws of
178 1889); and also about three hundred and forty-eight horses, seventy-one stages or wagonettes or omnibuses, one truck, two carts, all the harness used by said dissolved corporation, or the Receiver thereof, in running the line of stages, hay, feed, tools, the implements, furniture and supplies on hand, together with all the other property of said dissolved corporation, (excepting the lease hereinbefore mentioned and described), used by said dissolved corporation and by me in running the said line of stages and managing its business. Including also two past due promissory notes made by J. Rosenfeld, the first for the sum of one hundred and twenty-five dollars, dated December 17th, 1893, and payable thirty days after date, to the order of Fifth Avenue Transportation Company, Limited, at 616 Bennett Building, New York, the second, dated Decem-

DARK PAGE BL

ber 20th, 1893, for the sum of one hundred and seventy-five dollars and payable thirty days after date to the order of Fifth Avenue Transportation Company, Limited, at 616 Bennett Building, New York.

To have and to hold the same unto the said Ward Campbell, his executors, administrators and assigns forever.

In witness whereof, I have hereunto set my hand and affixed my seal as Receiver of said Fifth Avenue Transportation Company, Limited, this 26th day of November, one thousand eight hundred and ninety-five.

[SEAL.] DANIEL T. HOAG, *Receiver.*

Signed, sealed and delivered in presence of
JOSEPH R. GUERNSEY.

179 STATE OF NEW YORK,
City and County of New York, ss:

On this 26th day of November, 1895, before me personally appeared Daniel T. Hoag, to me known and known to me to be the person described in and who executed the foregoing instrument, and he acknowledged to me that he executed the same as the Receiver of the Fifth Avenue Transportation Company, Limited.

JOSEPH R. GUERNSEY,
Notary Public, City and County of New York.

PLAINTIFF'S EXHIBIT L.

Fifth Avenue Coach Company.

Certificate of Incorporation.

We, the undersigned, a majority of whom are citizens and residents of the State of New York, desiring to become a corporation, pursuant to the provisions of the Stock Corporation Law, and to take and possess the property and franchises of a domestic stock corporation sold as hereinafter stated, do hereby make, acknowledge and file this certificate for that purpose, and certify, as required by Section 3 of said law, as follows:

That the property and franchises of the "Fifth Avenue Transportation Company (Limited)," a domestic stock corporation, organized under Chapter 611 of the Laws of 1875, of the State of New York, entitled "An Act to provide for the organization and regulation of certain business corporations," were, on the 17th day of
180 October, 1895, duly sold under and by virtue of an order of the Supreme Court of said State of New York, rendered in a special proceeding in said Court, entitled, "In the matter of Daniel T. Hoag, Receiver of Fifth Avenue Transportation Company (Limited)" dated and entered in the clerk's office of the county of New York, on the 17th day of July, 1895.

The following is a brief description of the property thus sold: All the rights acquired by and granted to the Fifth Avenue Trans-

portation Company (Limited), by the Acts of the Legislature of the State of New York, to wit: Chapter 535 of the Laws of 1886, and Chapter 182 of the Laws of 1889; and all the right to run or drive, or cause to be run or driven, a line of stages or coaches for the transportation of passengers for hire from 89th street in the city of New York, down Fifth avenue, across Washington Park and along West Broadway to the Bleecker street elevated station and return; and also about 360 horses, 71 stages or wagonettes or omnibuses, 1 truck, 2 carts, harness, hay, feed, tools, implements, furniture and supplies used in running the said line of stages and managing its business; and also two promissory notes amounting in principal to three hundred dollars; also a lease bearing date the 20th day of December, 1889, made to the said Fifth Avenue Transportation Company (Limited), recorded in the office of the Register of the City and County of New York, on the 2nd day of January, 1890, in Liber 2281 of Deeds, page 284.

That at such sale the undersigned, Ward Campbell, became the purchaser of and acquired the property and franchises sold, and has associated with himself the following persons: S. Duncan
181 Leverich, Charles Howard Strong, Howard Scribner and Walter G. A. Hemming,

That the name of the new corporation intended to be formed by the filing of this certificate shall be "Fifth Avenue Coach Company."

That the maximum amount of its capital stock shall be Three Hundred Thousand Dollars ($300,000) and the number of shares into which the same shall be divided is 3,000, and all the shares shall be common stock.

That the number of directors who shall manage the affairs of the new corporation shall be five, and the names and post office addresses of the directors for the first year are as follows:

Name.	Post Office Address.
Edmund C. Converse,	No. 8 E. 67th St., New York City.
D. Prescott Hall,	Plainfield, N. J.
S. Duncan Leverich,	No. 15 W. 48th St., New York City.
W. G. Peckham,	Westfield, N. J.
Ward Campbell,	No. 34 James St., Newark, N. J.

That no plan of agreement was entered into at or previous to such sale in anticipation of the formation of a new corporation.

In Witness Whereof, we, the undersigned, the said purchaser and his associates, have made this certificate in duplicate and have hereunto subscribed our names, this 23rd day of July, 1896:

WARD CAMPBELL,
34 James St., Newark, N. J.
S. DUNCAN LEVERICH,
15 West 48th St., N. Y. City.
CHARLES HOWARD STRONG,
79 E. 56th St., N. Y. City.
HOWARD SCRIBNER,
Pelham, N. Y.
WALTER G. A. HEMMING,
58 Sidney Ave., Mount Vernon, N. Y.

182 STATE OF NEW YORK,
City and County of New York, ss:

On the 24th day of July, in the year one thousand eight hundred and ninety-six, before me personally came Ward Campbell, S. Duncan Leverich, Charles Howard Strong, Howard Scribner and Walter G. A. Hemming, to me known to be the individuals described in and who executed the foregoing certificate of incorporation, and severally acknowledged to me that they executed the same for the uses and purposes therein expressed.

[SEAL.]

F. W. STELLE,
Notary Public (193), *N. Y. Co.*

STATE OF NEW YORK,
City and County of New York, ss:

I, Henry D. Purroy, Clerk of the City and county of New York, and also Clerk of the Supreme Court for the said City and County, the same being a Court of record, do hereby certify, that F. W. Stelle, whose name is subscribed to the certificate of the proof or acknowledgment of the annexed instrument, and thereon written, was, at the time of taking such proof or acknowledgment, a notary public in and for the City and County of New York, dwelling in said city, commissioned and sworn, and duly authorized to take the same. And, further, that I am well acquainted with the handwriting of such notary, and verily believe that the signature to the said certificate of proof or acknowledgment is genuine.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Court and County, the 24 day of July, 1896.

[SEAL.]

HENRY D. PURROY, *Clerk.*

183 Tax for Privilege of Organization of this Corporation,
$375.00
Under Chapter 143, Law of 1886, Paid to State Treasurer Before Filing.

STATE OF NEW YORK,
Office of Secretary of State:

Filed and Recorded Jul. 25, 1896.

ANDREW DAVIDSON,
Deputy Secretary of State.

STATE OF NEW YORK,
Office of the Secretary of State, ss:

I have compared the preceding with the original Certificate of Reorganization of the "Fifth Avenue Coach Company," filed and recorded in this office on the 25th day of July, 1896, and do Hereby Certify the same to be a correct transcript therefrom and of the whole thereof.

Witness my hand and the seal of office of the Secretary of State,

at the City of Albany this twenty-second day of November, one thousand nine hundred and seven.

[SEAL.] JAMES L. WHALEN,
Deputy Secretary of State.

STATE OF NEW YORK,
County of New York, ss:

I, Peter J. Dooling, Clerk of the said County and Clerk of the Supreme Court of said State for said County, do certify, That I have compared the preceding with the original Certificate of Incorporation of Fifth Avenue Coach Company, on file in my office,
184 and that the same is a correct transcript therefrom, and of the whole of such original.

Indorsed, Filed and Recorded July 27, 1896, 10 h., 10 m.

In Witness Whereof, I have hereunto subscribed my name and affixed my official seal, this 29th day of Nov., 1907.

[SEAL.] PETER J. DOOLING, *Clerk.*

PLAINTIFF'S EXHIBIT M.

Bill of Sale.

Ward Campbell to Fifth Avenue Coach Company.

Whereas heretofore, and at various times, rights, licenses, privileges and franchises were granted by the State of New York and by the City of New York to various parties for the conveyance of passengers upon Fifth avenue in the City of New York, which rights, licenses, privileges and franchises were heretofore vested in and owned by the Fifth Avenue Transportation Company (Limited), and were later sold, assigned, transferred and conveyed to me; and

Whereas certain rights, licenses, privileges and franchises were conferred on the said Fifth Avenue Transportation Company (Limited), by virtue of certain statutes of the State of New York; and whereas, said company purchased certain rights and franchises fram Jacob Sharp, and from others; and whereas, the said Fifth Avenue Transportation Company (Limited) heretofore possessed certain chattels and property; and whereas; the rights, licen-
185 ses, privileges and franchises, and property of said Fifth Avenue Transportation Company were heretofore sold, assigned, and transferred and conveyed and made over to me; and

Whereas, I have taken possession of all the said rights, licenses, privileges, franchises and properties so acquired by me, and whereas the said line of stages and coaches has been prevented from running on parts of the Fifth avenue of late,

Now, therefore, know all men by these presents, That I, Ward Campbell, in consideration of the sum of forty thousand dollars ($40,000) to me in hand and paid before the ensealing of these presents, and of other good and valuable considerations, the receipt whereof is hereby acknowledged, have sold, and by these presents

do grant, convey, sell, assign, transfer and make over unto the Fifth Avenue Coach Company all of said rights, licenses, privileges, franchises and properties which became vested in me by purchase from the Receiver of said Fifth Avenue Transportation Company, and also all the properties and rights now vested in me, whether by purchase from the Receiver of said the Fifth Avenue Transportation Company (Limited), or by subsequent purchase.

And also, the various articles of personal property purchased by me from said Receiver and still in my use, or since acquired by me from said transportation business, including about 338 horses, 62 stages or wagonettes or omnibuses, and all the trucks, carts, harness, hay, feed, tools, implements, furniture and supplies on hand, together with all the property used by me in the operation of
186 business, and also all claims, damages and rights of action which I have against Matthew Baird, the contractor; Charles H. T. Collis, the Commissioner of Public Works; the Barber Asphalt Company, the City of New York, and any other person or corporation by reason of the interference with the running of said coaches, and I covenant and agree from time to time, when requested, to execute such further separate assignment as may be necessary or proper to more effectively vest in the party of the second part hereto or its assigns all or any of the franchises or property hereby assigned and transferred. And the intent of this assignment and conveyance is to assign and convey all the franchises that became vested in me and all the chattels that became vested in me and are still in my use and possession, and none other.

To have and to hold unto the said Fifth Avenue Coach Company, its successors and assigns forever.

A partial list of the chattels hereby sold is annexed, marked Schedule A.

In witness whereof, I have hereunto set my hand and seal, this 3d day of November, 1897.

WARD CAMPBELL. [SEAL.]

Signed, sealed and delivered in presence of

A. W. ANDREWS.

CITY AND COUNTY OF NEW YORK, *ss:*

On this 3d day of November, 1897, before me personally
187 came Ward Campbell to be known and known to me to be the individual described in and who executed the foregoing instrument and who to me acknowledged that he executed the same.

[SEAL.] A. W. ANDREWS,
Notary Public (28), *N. Y. C. and C.*

SCHEDULE A.

Partial Inventory of Property at 55 E. 88th St., N. Y., October 31st, 1897.

Horses.

338 Horses.

Stages.

41	Racine	Stages	17	Seats.	Rebuilt in	1896.
10	Stevenson	"	14	"	" "	"
2	Elmiras	"	16	"	" "	"
1	Athens	"	16	"	New "	"
1	Carette	"	20	"	Rebuilt "	"
1	Yellow	"	12	"		
1	Yellow	"	12	"		
6	English	"	35	"	Done over 1897.	

30 extra 3 horse hitchings and poles.
50 extra wheels in repair shop.
2 extra top seats for Racines.

Vehicles.

1 Top Buggy,
1 Wheel Cart,
1 Sand Cart,
1 3 Horse Feed Truck.

188 Harness.

400 Collars,
56 2 Horse Harness without collars.
6 3 " " for Jumbos.
30 pairs Extra Harness,
1 Set Buggy Harness
1 " Cart "
1 " Truck " 3 Horses.
2 " Tow "
1 " Yellow Stage Harness.

Harness Shop.

Complete set tools and other appliances.
Stock of leather, Hardware and Threads.

Shoeing Shop.

3 Fires complete with Power Blowers.
3 Anvils and other tools and boxes for shoes.

Blacksmith Shop.

2 Fires complete with Power Blowers,
Double outfit for blacksmiths,

Complete set Tools and Dies.
Pipe Cutter, Taps and Dies, all new,
Tire Welding Machine, new.
" bending " "
1 Power and 1 Hand Drilling Machine.
1 Clipping Machine, 3 Vises, etc.

Carpenter's Shop.

Benches, Tools, Vises, Jacks, etc.
Repair Materials, viz.: Panels, Mouldings, Sills, Fellows, Spokes, etc., Stoves, etc.

Paint Shop.

Benches, Brushes, Paints and Varnishes, Glass and other materials.

189 Store Room.

Every kind of Carriage bolts, Screws and Washers, Axles, Axle Arms and new boxes,
Iron and Steel Bars, Tire Iron,
Horse Shoes and nails and caulking steels,
Candles and Candle butts,
Blankets, Carpets and oil covers for Stages,
Fare boxes, Indicators, Sash, etc.
Axle grease, oils, etc., etc.

Office.

6 Office desks and chairs,
4 " Safes,
3 Complete Iron Gratings for Receivers,
2 Stoves, office appliances, stationery, etc.
Starter's office, Desk and Stove, 89th Street.
" " " " " Bleecker St.

Stable.

Feed and other hand trucks, Forks, Brooms, Shovels, Brushes, etc., for 22 Hostlers,
Fire appliances throughout,
600 New Stall Slats,
400 Halters and Chains.

Hospital.

Slings and other medical appliances,
Full stock of drugs.

Lamp House.

House, Lamp Cart, Oil and Matches.

Feed Loft.

15 Horse Power Gas Engine,
1 New Hay Cutter and Knives,
1 Grinding Mill,
190 1 Iron Mixing Pan, 15 x 20,
Belts, Pullies, Shafting Hangers, etc.

Feed.

About 9 or 10 days' feed for 400 Horses of Hay, Oats, Corn and Salt.

PLAINTIFF'S EXHIBIT N.

Chapter 657, Laws 1900.

An Act to amend the transportation corporations law by the addition thereto of a new section in relation to existing routes and extensions.

Became a law, April 25, 1900, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Chapter five hundred and sixty-six of the laws of eighteen hundred and ninety, entitled "An Act in relation to transportation corporations excepting railroads, constituting chapter forty of the general laws," is hereby amended by adding thereto a section to be section twenty-three, and to read as follows:

§23. Existing routes and extensions.—Any corporation incorporated under any law of this State heretofore enacted, which
191 owns and operates a lawfully established stage route which has been continuously operated by such company or its predecessors in title to such route for five years last past in any city of the first class, is hereby authorized and empowered to extend its existing routes at any time or times and to operate the same as extended with stages and omnibuses propelled by electricity or any other motive power, in and upon any streets and highways of such city, without further or other authority, proceeding, or consent required under any act, general, public, private or local; provided, however, that such extensions shall not become valid until they shall have been first approved by the State Board of Railroad Commissioners, who, on giving their approval, shall make a certificate of such extension or extensions of route as approved, which certificate shall be filed in the office of the Secretary of State, and in the office of the clerk of the county in which such extension is located. Such company, on filing in said offices an acceptance of the extensions specified in such certificate and on operating such extensions, shall have the right to charge a fare not exceeding ten cents per passenger for a continuous ride over the whole or any part of the routes

owned or operated by it, and shall pay a license fee to the city in which it operates equal to the charge now in force for licensing similar stages and omnibuses, and shall also pay to the Comptroller or other chief fiscal officer of said city five per centum per annum of its gross receipts from the operation of said routes.

§2. This act shall take effect immediately.

192 PLAINTIFF'S EXHIBIT O.

Fifth Avenue Coach Company.

Certificate of Approval of Extensions of Route.

Before the Board of Railroad Commissioners of the State of New York, at the Capitol, Albany, August 2, 1900.

Present: Com. Ashley W. Cole, Com. Frank M. Baker, Com. George W. Dunn,

In the Matter of the Application of the FIFTH AVENUE COACH COMPANY for a Certificate Approving the Extension of its Routes, under Chapter 657 of the Laws of 1900.

Application having been made to the Board of Railroad Commissioners by the Fifth Avenue Coach Company for approval by the Board, under Chapter 657 of the Laws of 1900 of extensions of its route established by Chapter 536 of the laws of 1886, and the filing of certificates of said extensions as approved in the offices of the Secretary of State and of the clerk of the county of New York, and due proof being given that said company
193 and its predecessors in title now own and operate, and have continuously owned and operated for more than five years prior to the 25th day of April, 1900, a lawfully established stage route in the borough of Manhattan, city of New York, from the junction of South Fifth avenue and Bleecker street, thence along South Fifth avenue across Washington Park and along Fifth avenue to East 89th street, and it appearing that said company is authorized and empowered to extend its routes, subject to the approval of this Board, under the provisions of said act, and a public hearing, pursuant to public notice, due proof of publication of which has been filed with the Board, having been given on said application at the Fifth Avenue Hotel, in the City of New York, on the 2d day of August, 1900, William H. Page, Jr., appearing for said application, and no one appearing in opposition thereto, it is,

Ordered, that the said application be and the same hereby is granted and that the Board of Railroad Commissioners, in accordance with Chapter 657 of the Laws of 1900, hereby approves the extension or extensions of the said route of the Fifth Avenue Coach Company as established by Chapter 536 of the Laws of 1886, upon streets and highways in the borough of Manhattan, county of New York, as follows:

From the terminus of its existing route upon Fifth avenue at East 89th street; thence along Fifth avenue to East 120th street, thence westerly from Fifth avenue along West 120th street, to Mt. Morris avenue or Mt. Morris Park West; thence along Mt.
194 Morris avenue or Mt. Morris Park West, to West 124th street or Mt. Morris Place; thence along West 124th street or Mt. Morris Place to Fifth avenue; thence along Fifth avenue to East 135th street; also from the intersection of Fifth avenue and West 110th street westerly along West 110th street and Cathedral Parkway to Riverside Drive or avenue; also from the intersection of its existing route at West 57th street and Fifth avenue; thence along West 57th street to Broadway; thence along Broadway, crossing Grand Circle to West 72d street, and thence easterly along West 72d street to Eighth avenue or Central Park West; also from Broadway westerly along West 72d street to Riverside Drive or avenue; thence along Riverside Drive or avenue to West 124th street.

And the Board of Railroad Commissioners also hereby certifies that it has approved of said extension or extensions of the route of said Fifth Avenue Coach Company and orders that a copy of this approval and certificate be filed in the office of the Secretary of State and in the office of the clerk of the county of New York.

By the Board,

[SEAL.] JNO. S. KENYON,
Secretary.

STATE OF NEW YORK,
Office of the Secretary of State, ss:

I have compared the preceding with the Certificate of Approval of extension of Route of the "Fifth Avenue Coach Company," filed in this office on the 3rd day of August, 1900, and do hereby certify the same to be a correct transcript therefrom and of the whole thereof.

195 Witness my hand and the seal of office of the Secretary of State, at the City of Albany, this twenty-second day of November, one thousand nine hundred and seven.

[SEAL.] JAMES L. WHALEN,
Deputy Secretary of State.

STATE OF NEW YORK,
County of New York, ss:

I, Peter J. Dooling, Clerk of the said County and Clerk of the Supreme Court of said State for said County, do certify, That I have compared the preceding with the original Certificate of Approval of Extension of Route on file in my office, and that the same is a correct transcript therefrom, and of the whole of such original.

Indorsed Filed. Aug. 4, 1900, 10h., 5m.

In witness whereof, I have hereunto subscribed my name and affixed my official seal, this 27th day of Nov., 1907.

[SEAL.] PETER J. DOOLING, *Clerk.*

PLAINTIFF'S EXHIBIT P.

Fifth Avenue Coach Company.

Acceptance of Extensions of Routes.

Know all men by these presents, that the Fifth Avenue Coach Company, in pursuance of Chapter 657 of the Laws of 1900, hereby accepts the extensions of its stage routes specified in the approval and certificate of the State Board of Railroad Commissioners, made by said Board on the 2nd day of August, 1900, and filed in the
196 office of the Secretary of State of the State of New York on the 3rd day of August, 1900, and in the office of the clerk of the county of New York on the 4th day of August, 1900, said extensions as specified in said approval and certificate being as follows:

From the terminus of its existing route upon Fifth avenue at East 89th street; thence along Fifth avenue to East 120th street; thence westerly from Fifth avenue along West 120th street to Mt. Morris avenue or Mt. Morris Park West; thence along Mt. Morris avenue or Mt. Morris Park West to West 124th street or Mt. Morris Place; thence along West 124th street or Mt. Morris place to Fifth avenue; thence along Fifth avenue to East 135th street; also from the intersection of Fifth avenue and West 110th street westerly along West 110th street and Cathedral Parkway to Riverside Drive or avenue; also from the intersection of its existing route at West 57th street and Fifth avenue; thence along West 57th street to Broadway; thence along Broadway, crossing Grand Circle, to West 72nd street, and thence easterly along West 72nd street to Eighth avenue or Central Park West; also from Broadway westerly along West 72nd street to Riverside Drive or avenue; thence along Riverside Drive or avenue to West 124th street.

In witness whereof, said company has caused its corporate name to be hereunto subscribed by its President and its seal to be affixed, this 4th day of August, 1900.

FIFTH AVENUE COACH COMPANY.
[SEAL.] By HENRY SANDERSON, *President.*

197 STATE OF NEW YORK,
Office of the Secretary of State, ss:

I have compared the preceding with the Certificate of Acceptance of Extension of Route by the "Fifth Avenue Coach Company," filed in this office on the 4th day of August, 1900, and do hereby certify the same to be a correct transcript therefrom and of the whole thereof.

Witness my hand and seal of office of the Secretary of State, at the City of Albany, this twenty-second day of November, one thousand nine hundred and seven.

[SEAL.] JAMES L. WHALEN,
Deputy Secretary of State.

STATE OF NEW YORK,
County of New York, ss:

I, Peter J. Dooling, Clerk of the said County and Clerk of the Supreme Court of said State for said County, do certify, That I have compared the preceding with the original Certificate of Acceptance of Extension of Route on file in my office and that the same is a correct transcript therefrom and of the whole of such original.

Indorsed Filed. Aug. 4, 1900, 10 h. 30 m.

In witness whereof, I have hereunto subscribed my name and affixed my official seal, this 27th day of Nov., 1907.

[SEAL.] PETER J. DOOLING, *Clerk.*

198 PLAINTIFF'S EXHIBIT Q.

Fifth Avenue Coach Company.

Certificate of Approval of Extensions of Routes.

Before the Board of Railroad Commissioners of the State of New York, at the Capitol, Albany, February 21, 1901.

Present: Com. Ashley W. Cole, Com. Frank M. Baker.

In the Matter of the Application of the FIFTH AVENUE COACH COMPANY for a Certificate Approving Extensions of Its Routes under Chapter 657 of the Laws of 1900.

Application having been made to the Board of Railroad Commissioners by the Fifth Avenue Coach Company for approval by the Board, under Chapter 657 of the Laws of 1900, of extensions of its routes, established by Chapter 536 of the Laws of 1886, and by a duly accepted order of this Board made August 2d, 1900, the original routes of said company, including all extensions, to be operated in either direction, with such service as to time and distance as
199 the said company shall find necessary, and in case of the obstruction of any portion of the company's route at any time by works of public improvement, a provisional route to be adopted and operated while such obstruction continues along such streets in the vicinity of the obstructed portion as the said company shall find adapted to the public convenience during the period of such obstruction; and due proof being given that said company and its predecessors in title now own and operate and have continuously owned and operated for more than five years last past a lawfully established stage route in the Borough of Manhattan, City of New York from the junction of South Fifth avenue and Bleecker street; thence along South Fifth avenue across Washington Park and along Fifth avenue to East 89th street; and that the existing routes of said company now include said streets, as well as routes, extending from the terminus of its existing route upon Fifth avenue at East 89th street; thence along Fifth avenue to East 120th street; thence

westerly from Fifth avenue along West 120th street to Mt. Morris avenue or Mt. Morris Park West; thence along Mt. Morris avenue or Mt. Morris Park West to West 124th street or Mt. Morris Place; thence along West 124th street or Mt. Morris place to Fifth avenue; thence along Fifth avenue to East 135th street; also from the intersection of Fifth avenue and West 110th street westerly along 110th street and Cathedral Parkway to Riverside Drive or avenue; also from the intersection of its existing route at West 57th street and Fifth avenue; thence along West 57th street to Broadway; thence along Broadway, crossing Grand Circle, to West 72nd street; and thence easterly along West 72nd street to Eighth avenue or
200 Central Park West; also from Broadway westerly along West 72nd street to Riverside Drive or avenue; thence along Riverside Drive or avenue to West 124th street; and it appearing that said Company is authorized and empowered to extend its routes, at any time or times, subject to the approval of this Board, under the provisions of said Act, and a public hearing, pursuant to public notice, due proof of publication of which has been filed with the Board on the 21st day of February, 1901, William H. Page, Jr., appearing for said application, and no one appearing in opposition thereto; it is

Ordered that the said application be and the same hereby is granted and that the Board of Railroad Commissioners, in accordance with Chapter 657 of the Laws of 1900, hereby approves said extensions of the existing routes of the Fifth Avenue Coach Company, as established by Chapter 536 of the Laws of 1886, and by order of this Board made August 2nd, 1900, upon streets and highways in the Borough of Manhattan, County of New York, as follows:

From the intersection of its route at Fifth avenue on East 72nd street; thence along East 72nd street to First avenue; also from its route on 110th street or Cathedral Parkway at the intersection of Seventh avenue; then northerly along Seventh avenue to 153rd street; thence along 153rd street to Macomb's Dam road; thence along Macomb's Dam road to the viaduct at 155th street; thence along 155th street to St. Nicholas place; thence along St. Nicholas place to St. Nicholas avenue; thence along St. Nicholas avenue to Manhattan avenue; and thence along Manhattan avenue to
201 110th street or Cathedral Parkway; also from the terminus of its route on Riverside Drive or avenue at West 124th street; thence northerly along Riverside Drive or avenue over the new viaduct to West 135th street; thence along West 135th street to Broadway.

And the Board of Railroad Commissioners also hereby certifies that it has approved and does hereby approve the extensions above mentioned or described of the routes of said Fifth Avenue Coach Company and orders that a copy of this approval and certificate be filed in the office of the Secretary of State and in the office of the Clerk of the County of New York.

BY THE BOARD OF RAILROAD COMMISSIONERS.

[SEAL.] JNO. S. KENYON, *Secretary.*

STATE OF NEW YORK,
Office of the Secretary of State, ss:

I have compared the preceding with the Certificate of Approval of Extension of Route of the "Fifth Avenue Coach Company," filed in this office on the 21st day of February, 1901, and do hereby certify the same to be a correct transcript therefrom and of the whole thereof.

Witness my hand and the seal of office of the Secretary of State at the City of Albany this twenty-second day of November, one thousand nine hundred and seven.

[SEAL.] JAMES L. WHALEN,
Deputy Secretary of State.

202 STATE OF NEW YORK,
County of New York, ss:

I, Peter J. Dooling, Clerk of the said County and Clerk of the Supreme Court of said State for said County, do certify that I have compared the preceding with the original Certificate of Approval of Extension of Route on file in my office, and that the same is a correct transcript therefrom, and of the whole of such original.

Indorsed Filed. Feb. 23, 1901.

In witness whereof I have hereunto subscribed my name and affixed my official seal this 27th day of November, 1907.

[SEAL.] PETER J. DOOLING, *Clerk.*

PLAINTIFF'S EXHIBIT R.

Fifth Avenue Coach Company.

Acceptance of Extensions of Routes.

Know All Men by These Presents, that the Fifth Avenue Coach Company, in pursuance of Chapter 657 of the Laws of 1900, hereby accepts the extensions of its stage routes specified in the approval and certificate of the State Board of Railroad Commissioners, made by said Board on the 21st day of February, 1901, and filed in the office of the Secretary of State of the State of New York on the 21st day of February, 1901, and in the office of the Clerk of the County of New York on the 23d day of February, 1901.

203 In witness whereof, said Company has caused its corporate name to be hereunto subscribed by its President and its seal to be affixed this 23rd day of February, 1901.

FIFTH AVENUE COACH COMPANY.

[SEAL.] By HENRY SANDERSON, *President.*

STATE OF NEW YORK,
Office of the Secretary of State, ss:

I have compared the preceding with the Certificate of Acceptance of Extension of Route of the "Fifth Avenue Coach Company," filed

in this office on the 23rd day of February, 1901, and do hereby certify the same to be a correct transcript therefrom and of the whole thereof.

Witness my hand and the seal of office of the Secretary of State, at the City of Albany this twenty-second day of November, one thousand nine hundred and seven.

[SEAL.] JAMES L. WHALEN,
Deputy Secretary of State

STATE OF NEW YORK,
County of New York, ss:

I, Peter J. Dooling, Clerk of the said County and Clerk of the Supreme Court of said State for said County, do certify, That I have compared the preceding with the original Certificate of Acceptance of Extension of Route on file in my office, and that the same is a correct transcript therefrom, and of the whole of such original.

204 Indorsed Filed. Feb. 23, 1901.

In witness whereof, I have hereunto subscribed my name and affixed my official seal this 27th day of Nov., 1907.

[SEAL.] PETER J. DOOLING, *Clerk.*

DEFENDANT'S EXHIBIT No. 1.

Agreement made May 11th, 1907, between the Fifth Avenue Coach Company, a New York corporation (hereinafter called the "Coach Company"), party of the first part, and the Railway Advertising Company, a West Virginia Corporation (hereinafter called the "Advertising Company"), party of the second part;

Whereas, heretofore on or about May 15, 1905, the parties hereto made a written agreement, still in force with respect to the use of advertising space on the interior, and to a limited extent on the exterior, of certain coaches and omnibuses operated by the party of the first part; and

Whereas, the parties desire to enter into an agreement with respect to the further use of the exterior of such coaches or omnibuses, for the purposes of advertising;

Now Therefore, this agreement Witnesseth:

That in consideration of one dollar ($1) and of other valuable considerations by each party paid to the other, the receipt of which is hereby acknowledged, said parties agree as follows:

205 (1.) The Coach Company, grants and leases to the Advertising Company, for the term beginning with the execution of this agreement, and terminating on the 31st day of December, 1913, subject to an earlier termination of said term as hereinafter provided, the exclusive right and privilege of maintaining advertising signs upon the exterior of each and every coach or omnibus, now operated or run, or which may hereafter be operated or run upon the regular route of said Coach Company, extending from 89th Street, in the City of New York, down Fifth Avenue,

across and to the south side of Washington Park and return, and upon any additional route or extension of its route which shall be operated by it during the above term; and agrees that all advertising signs placed upon the exterior of such coaches or omnibuses, under the terms and conditions of this agreement, shall remain thereon during all times when said coaches or omnibuses are traversing the route or routes above indicated, as public carriers.

(2.) The Advertising Company agrees to pay the Coach Company for such exclusive privilege for all the omnibuses of the Coach Company drawn by horses, the sum of $1,250 per annum, and the sum of $200 per annum for each motor omnibus propelled by machinery without animal traction. The annual payment for each of such motor vehicles shall begin to accrue when such vehicle is put in service on said route or routes.

(3.) The Advertising Company agrees to make payments due under this contract in quarterly installments in advance; the first payment to be made on the 15th day of May, 1907, and subsequent payments at recurring intervals of three calendar months, at the office of the Coach Company, in the Borough of Manhattan, City of New York. Payments may be by check.

(4.) The spaces on the exterior of the coaches and omni-
206 buses which the Advertising Company shall be entitled to use under this contract shall be the outside of the screens extending along the edges on both sides and on both ends of the roofs of said vehicles and along the stairways to the roofs, said screens not to be less than 28 inches in height along the sides, and, as far as practicable, along the ends, and 22 inches in height along the stairways; the risers of all steps, the rear sides of the backs of the seats on the roofs, and the platform screens under the stairways on the left side of the vehicles.

Said advertising signs must not, however, interfere with the operation of any coach or omnibus, or with the convenience or comfort of passengers. The frames, screens or racks in which such advertisements are to be inserted upon said coaches or omnibuses drawn by horses shall be furnished, put in place, and kept in good repair by the Advertising Company, at its own expense; on the motor coaches or omnibuses they shall be provided by the Coach Company, but shall be kept in repair by the Advertising Company. The dimensions, subject to above minimum of height, the style and appearance of said frames, racks and screens shall be subject to the approval of the Coach Company and their construction shall be such as to admit of covering or obscuring the advertisements whenever such coaches or omnibuses are passing over any parkway or other public place where the display of signs or advertisements on vehicles is prohibited by public authority or whenever such vehicles are in use under private charter, and the Coach Company is hereby authorized to cause any signs or advertisements herein referred to to be covered or obscured, when required by public authority, or when vehicles are under private charter, as aforesaid. The Advertising Company agrees to provide coverings for the purpose of obscuring advertisements on six coaches or omnibuses, the labor of

putting on and taking off covers to be performed by the Coach Company at its own expense.

207 (5.) All advertisements, and the racks, frames or screens containing them, shall be so constructed and placed as not to interfere in any way with the opening or closing of doors, ventilators, lamp boxes or windows of such coaches or omnibuses.

(6.) No advertising sign or device forbidden by any public authority shall be placed on any of said coaches or omnibuses, nor shall any sign or device be placed thereon to which the Coach Company may reasonably object. The installation of all advertising signs, devices, racks, frames or screens under this agreement shall be made by the Advertising Company at such times and in such places as not to interfere with the business of the Coach Company, and shall be subject to the reasonable supervision of the officers of the Coach Company. For the purpose of installing and removing advertisements from time to time, the Advertising Company, its employees and servants may enter upon the premises of the Coach Company, and may have access to its coaches and omnibuses at all reasonable hours.

(7.) The Advertising Company agrees that it will not assign this contract without the written consent of the Coach Company.

(8.) If any suit or suits at law or in equity shall be brought against the Coach Company, its successors or assigns, for any alleged infringement of any letters patent, or any trade-mark or trade-name, by reason of the use or display of any advertisement, or of any frame, screen or rack hereinbefore referred to, or because of the use or display of any sign, figure, device, or any other matter or thing placed upon said coaches or omnibuses by the Advertising Company, and used in or about any of its advertisements or displays—whether such alleged patent or patents, or trade-marks or trade-names cover the method of advertising as a whole, or any part thereof, or

208 anything relating thereto, in all of the cases mentioned, the Advertising Company agrees to assume the defense of any such suit or suits, and agrees to save harmless the Coach Company, its successors or assigns from any and all damage, costs and expenses of every kind and nature, arising out of the said suits, or any of them, including any order, judgment or decree made or entered therein, and all damage that may be sustained by reason of any injunction granted therein. The amount payable under this contract by the Advertising Company shall continue to accrue and to be payable during the continuance of any such injunction, in the same manner and to the same extent as if the same had not been issued.

(9.) The Advertising Company and its successors agree to indemnify and save harmless the Coach Company against any and all claims, judgments, damages, costs, counsel fees, or expenses of any kind which it may be put to, or suffer or incur, by reason of any claim for damages arising out of the negligence or misconduct of the employees of the Advertising Company, or from any of said frames, screens, racks or advertisements being out of order, or in such condition as to cause any injury to the person or clothing, or property, of any passenger, provided the Advertising Company

shall receive notice of any such claim, and shall have an opportunity to defend the same.

(10.) The Coach Company agrees that it will not during the continuance of this contract, grant any advertising privilege for the use of the exterior of its coaches or omnibuses, except to the Advertising Company.

(11.) It is agreed by the parties hereto that the Coach Company shall have the right to terminate this agreement upon fifteen months' written notice delivered to the Advertising Company, or, if at any time any order or judgment of a court having jurisdiction
209 in the premises shall be entered, or any act of the Legislature of the State of New York shall be passed, or any ordinance or resolution of the City of New York or of any branch of the City Government shall be adopted, which forbids the use of the exterior of said vehicles for advertising purposes, or which imposes any tax or license fee upon said vehicles by reason of such exterior advertising, in addition to the tax or license fee now paid for the same, which additional tax or license fee the Advertising Company shall refuse to pay, the Coach Company shall, in any such event, have the right to terminate this agreement upon thirty days' written notice to the Advertising Company.

(12.) It is agreed that the Coach Company will, if practicable, provide the Advertising Company with a sufficient space at some one terminal station, for the convenience of the business of the Advertising Company, but it is distinctly understood that this agreement does not bind the Coach Company to provide any specified amount of space for the purpose aforesaid.

In Witness Whereof, the parties have caused these presents to be executed by their duly authorized officers, and their respective seals to be hereunto affixed the day and year first above written.

FIFTH AVENUE COACH COMPANY.
[SEAL.] By RICHARD W. MEADE, *President.*
RAILWAY ADVERTISING COMPANY,
[SEAL.] By A. WINEBURGH, *President.*

Attest:
JESSE WINEBURGH, *Sec'y.*

210 STATE OF NEW YORK,
County of New York, ss:

On the eleventh day of May, in the year one thousand nine hundred and seven, before me personally came R. W. Meade, to me known, who, being by me duly sworn, did depose and say that he resided in
that he is the President of the Fifth Avenue Coach Company, the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

H. F. CARSON,
Notary Public, Rockland Co.

Certificate filed in N. Y. Co.

STATE OF NEW YORK,
County of New York, ss:

On the 16th day of May, in the year one thousand nine hundred and seven, before me personally came A. Wineburgh, to me known, who, being by me duly sworn, did depose and say that he resided in the Borough of Manhattan, N. Y. City, that he is the President of the Railway Advertising Company, the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

HARRY WAUDMACHER,
Com. of Deeds, N. Y. City.

211 DEFENDANT'S EXHIBIT No. 2.

This Agreement, made as of the fifteenth day of May, 1905, between the Fifth Avenue Coach Company, a corporation formed, organized and existing under the Laws of the State of New York (hereinafter called the "Coach Company"), party of the first part, and the Railway Advertising Company, a corporation organized under the laws of West Virginia (hereinafter called the "Advertising Company"), party of the second part;

Whereas the Coach Company owns and operates a line of stages over a route extending from 89th street in the City of New York, down Fifth Avenue, across and to the South side of Washington Park and return;

Now, therefore, this agreement witnesseth: That in consideration of one dollar and other valuable considerations by each party to the other paid, the receipt whereof is hereby acknowledged, the said parties agree as follows:

(1) The Coach Company hereby grants and leases unto the said Advertising Company, for the term of eight (8) years, seven and one-half (7½) months, to begin on the fifteenth day of May, 1905, and to end on the thirty-first day of December, 1913, the exclusive right and privilege of maintaining advertising signs in each and every coach or omnibus now operated or run or which may hereafter be operated or run over the above-named route in the City of New York, by the said Coach Company, and upon any additional route or extension of its route operated by it, during the above term, and agrees that all advertising signs placed in such coaches or omnibuses, under the terms and conditions hereinafter contained, shall
212 remain therein during all times when said coaches or omnibuses are traversing the route above named, as public carriers.

(2) The said Advertising Company shall pay to the Coach Company for such exclusive privilege the sum of Three thousand seven hundred and fifty dollars ($3,750) per year during said term except as hereinafter provided. All payments hereunder shall be made in

quarterly installments in advance, the first payment to be made on the fifteenth day of May, 1905, and the remaining payments at intervals of three calendar months, thereafter, at the office of the Coach Company in the City of New York.

(3) If at any time during the said term the Coach Company shall substantially discontinue the use on said route of omnibuses and stages drawn by horses, and shall operate the same with automobile stages or omnibuses, to the extent of ninety (90) per cent. of the vehicles operated on its routes, the Advertising Company, on and after the date when such change of operation is completed shall continue to have the same right or privilege of advertising, but shall pay therefor at the rate of Ten thousand dollars ($10,000) per year, during the remainder of said term, payable quarterly in the manner above provided. It is understood that in case there be a change of the equipment to automobiles, as above provided, the Company shall still have the right, in case of breakdown or in unexpected contingencies, temporarily to operate the whole or any portion of the route by stages drawn by horses. If, at the expiration of the five (5) years from the fifteenth day of May, 1905, the Coach Company shall be operating an average in excess of seventy-five coaches per day, the compensation above provided shall be increased at the rate of One hundred and thirty-three dollars and thirty-three cents ($133.33) per year per additional omnibus or coach, in operation on said date.

213 (4) The Advertising Company may place on the roofs of said coaches or omnibuses four flags or signs for the purpose of advertising or displaying thereon announcements of events of public interest or amusement calculated to attract passenger travel to the Coach Company's line. Two of the said flags or signs shall be for the exclusive use of the Advertising Company and the other two may be used by the Coach Company as occasion may require for displaying announcements of public interest which do not conflict with the Advertising Company's rights hereunder. The two flags so reserved for the Coach Company's use may be used by the Advertising Company when not required by the Coach Company. The size, design, material and location of the said flags or signs, as well as the subject matter displayed thereon, shall be subject to the reasonable approval of the Coach Company.

(5) The spaces in the Coaches and omnibuses which the said Advertising Company shall be entitled to use hereunder, shall be all the spaces in the interior of the coaches and omnibuses which are on each side and at each end directly above the window line; and any additional space in the interior of said coaches or omnibuses that may be, and may from time to time become available, and which shall not interfere with the operation of the coach, may be used by said Advertising Company without additional charge. The racks in which advertisements are placed in the automobile coaches shall be constructed by the Coach Company and are to be curved and shall extend the full length of the coach on each side and to be so they will contain a sign 11 inches high. They shall be so constructed as to enable the advertisements to be temporarily removed, which may

be done by the Coach Company, when the stages or omnibuses of the Coach Company are used under private charter. All frames required for the accommodation or insertion of any of the signs shall be constructed, furnished and put in place by and at the expense
214 of the said Advertising Company and all racks and frames shall be kept in repair by it. The style and appearance of the racks and frames shall be subject to the approval of the Coach Company.

(6) The spaces hereinbefore referred to shall be used by the said Advertising Company in such manner and to such extent as not to interfere with the opening or closing of the doors of said coaches or omnibuses, or with the opening or closing of the ventilators, lamp-boxes or windows thereof.

(7) The Coach Company shall have the right to place in a conspicuous position in the interior of each of said coaches or omnibuses such printed rules, regulations or notices to passengers as it shall deem proper and also such printed rules, regulations or notices as may be required by any public authority, provided that, if possible, such rules, regulations or notices shall be so placed as not to interfere with any of the signs of the said Advertising Company.

(8) No advertising sign or device forbidden by any public authority shall be placed in any of the said coaches or omnibuses, nor shall any sign or device be therein placed of a character to which the Coach Company may reasonably object. All signs and devices used for advertising purposes shall be placed in said coaches or omnibuses by the said Advertising Company at such times and in such places as shall not interfere with the business of the Coach Company, and shall be subject to the reasonable supervision of the Coach Company's officers. For the purpose of placing advertisements in and removing the same from coaches or omnibuses, the said Advertising Company, its employees and servants, may enter upon the premises of the Coach Company and have access to the coaches or omnibuses therein at all reasonable hours.

215 (9.) The said Advertising Company shall not assign this contract, except with the written consent of the Coach Company.

(10.) In the event of the failure of the said Advertising Company to fulfill any of the agreements herein by it made, at the time and in the manner when the same are required by these presents to be done and performed, the Coach Company shall have the right to cancel and terminate this agreement and all of the rights of the said Advertising Company hereunder, after having given notice in writing of its intention so to do ten days prior to such cancellation.

(11.) If at any time during the term covered by this contract, any suit or suits shall be brought against the Coach Company, its successors or assigns, for any infringement or alleged infringement of any letters patent, or of any trade-mark or trade-name, by reason of the use or display of any advertisement or of any frame used as herein permitted, for the purpose of holding or containing or connected in any other manner with the advertisements of the said Advertising Company or because of the use or display of any sign, figure, device

or any other matter or thing placed in said coaches or omnibuses by the said Advertising Company, and used in or about any of its advertisements or displays, whether such alleged patent or patents or trade marks or trade names cover the method of advertising as a whole or any part, particle or portion thereof, or anything relating thereto, in any of said cases, the said Advertising Company agrees to assume the defense of any such suit or suits, and agrees to save and to hold harmless the Coach Company, its successors or assigns, from any and all damage, costs and expense of every kind and nature, arising out of said suits or any of them, including any order, judgment or decree made or entered therein, and all damage that may be sustained by reason of any injunction granted therein.
216 But the amounts payable by the said Advertising Company hereunder shall accrue and be payable during the continuance of any such injunction in the same manner and to the same extent as though the same had not been issued.

(12.) The said Advertising Company and its successors hereby agree to protect, indemnify, and save harmless, the said Coach Company against any and all claims, judgments, damages, costs, counsel fees or expenses which it may be put to or suffer or incur, by reason of any claim for damages arising out of the negligence or misconduct of the employees of the said Advertising Company, provided said Advertising Company receive notice and have an opportunity to defend the same.

(13.) The Coach Company shall not grant any advertising privileges except to the Advertising Company, but this provision shall not be construed to limit the right reserved to said Coach Company by paragraph number four of this agreement.

It is understood that this contract does not give the Advertising Company any right of advertising on the exterior of such coaches or omnibuses, except as hereinbefore provided in paragraph "(4)." If, at any time hereafter, such exterior advertising shall become practicable, in the judgment of the Coach Company, it may become the subject of an additional agreement with the Advertising Company.

(14.) This agreement shall bind the successors, personal representatives and assigns of the parties.

In Witness Whereof, the parties have caused these presents to be executed by their duly authorized officers and their
217 respective seals to be hereunto affixed, the day and year first above written.

[SEAL.] FIFTH AVENUE COACH COMPANY,
By R. W. MEADE, *President.*

[SEAL.] RAILWAY ADVERTISING COMPANY.
By A. WINEBURGH, *President.*

STATE OF NEW YORK,
County of New York, ss:

On the 24th day of February, in the year one thousand nine hundred and five, before me personally came Abraham Wineburgh, to me known, who being by me duly sworn, did depose and say that he resided in the Borough of Manhattan, New York City, that he is

the President of the Railway Advertising Company, the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

G. B. TOWNSEND,
Notary Public, N. Y. Co.

STATE OF NEW YORK,
County of New York, ss:

On the 24th day of February, in the year one thousand nine hundred and five, before me personally came Richard W. Meade, to me known, who, being by me duly sworn, did depose and say that he resided in the Borough of Manhattan, New York City, that
218 he is the President of the Fifth Avenue Coach Company, the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

ASHLEY F. ALLEN,
[SEAL.] *Notary Public, Kings Co.*

Certificate filed in N. Y. Co.

Stipulation.

It is hereby stipulated by and between the parties, that the printing of defendant's Exhibits 3, 4, 5 & 6, being photographs similar to the other photographic exhibits reproduced herein, be dispensed with.

It is hereby further stipulated that the said other photographs, viz.: defendant's Exhibits 7 to 17 inclusive, printed and inserted at the end of this case are reduced reproductions or the original photographs offered in evidence on the trial herein, and are otherwise true and correct copies of the same.

Dated, March 20, 1908.

PAGE, CRAWFORD & TUSKA,
Attorneys for Appellant.
FRANCIS K. PENDLETON,
Corporation Counsel, Attorney for Respondent.

219 Supreme Court.

FIFTH AVENUE COACH COMPANY, Appellant,
against
THE CITY OF NEW YORK, Respondent.

Order Filing Record in the Supreme Court.

Upon reading and filing the annexed consent, it is hereby
Ordered, that the foregoing case be settled as printed and that it be filed as a true and correct case on appeal herein, and it is ordered on file in the office of the Clerk of the Supreme Court.
Dated March 20, 1908.

DAVID LEVENTRITT,
Justice Supreme Court of the State of New York.

We hereby consent to the entry of the above order.
Dated March 20, 1908.

PAGE, CRAWFORD & TUSKA,
Attorneys for Appellant.
FRANCIS K. PENDLETON,
Corporation Counsel, Attorney for Respondent.

220 *Stipulation.*

It is hereby stipulated that the case on appeal as hereinbefore printed, contains true and correct copies of the judgment roll, judgment appealed from, notice of appeal from said judgment, the decision of the Court, the notice of exception thereto filed by the plaintiff herein, the plaintiff's proposed findings as passed upon by the court, the opinion of the court (hereinafter printed), and all the evidence taken and proceedings had upon the trial herein, and now on file in the office of the Clerk of the County of New York.
Certification hereof in pursuance of Section 1353 of the Code of Civil Procedure or otherwise, is hereby waived.
Dated New York, March 20, 1908.

PAGE, CRAWFORD & TUSKA,
Attorneys for Appellant.
FRANCIS K. PENDLETON,
Corporation Counsel, Attorney for Respondent.

221 Supreme Court.

FIFTH AVENUE COACH COMPANY, Appellant,
against
THE CITY OF NEW YORK, Respondent.

Order Filing Record in the Appellate Division.

Pursuant to Section 1353 of the Code of Civil Procedure, it is
Ordered, that the foregoing printed record be filed in the office

of the Clerk of the Appellate Division of the Supreme Court, in the First Judicial Department.

Dated New York, March 20, 1908.

Enter,

DAVID LEVENTRITT,
Justice Supreme Court, State of New York.

222 Supreme Court, Special Term, Part IV.

THE FIFTH AVENUE COACH COMPANY, Plaintiff,
vs.
THE CITY OF NEW YORK, Defendant.

Opinion.

LEVENTRITT, *J.:*

The plaintiff seeks to enjoin municipal interference with the advertising signs displayed on the exterior of its stages, but it fails to establish that clear legal right the existence of which is a condition indispensable to equitable relief.

The defendant insists that the signs constitute a public nuisance. Although not bearing upon the ultimate disposition of the controversy, it may not be amiss to discuss this subject as a preliminary to the main questions presented.

Prior to July, 1907, the plaintiff operated along Fifth avenue stages propelled by horse power and during that month automobile stages were substituted. The latter stages contain an upper deck with tansverse seats accommodating eighteen passengers. A staircase leads from the body or platform of the stage to the upper deck which is surrounded by a wire screen, about three feet high extending around the top of the stage and down the stairway.

223 In May, 1905, the plaintiff entered into an agreement with the Railway Advertising Company whereby it leased to that Company the exclusive right to maintain advertising signs on the interior of its stages, coaches or omnibuses when employed as "public carriers;" also the right to maintain four advertising flags on the roofs of the stages "for the purpose of advertising or displaying thereon announcements of events of public interest or amusement calculated to attract passenger travel to the Coach Company's line." Two of these flags were to be "used by the Coach Company as occasion may require for displaying announcements of public interest" such as did not conflict with the Advertising Company's rights. The contract provided for the regulation of the size and character of the signs to be displayed but prohibited exterior advertising.

In May, 1907, a second agreement was entered into by the plaintiff with the Railway Advertising Company granting "the exclusive right and privilege of maintaining advertising signs upon the exterior of each and every coach or omnibus."

The plaintiff reserved the right to cancel the agreement upon thirty days' notice "if at any time any order or judgment of a court

having jurisdiction in the premises shall be entered; or any act of the Legislature of the State of New York shall be passed, or any ordinance or resolution of the City of New York or of any branch of the City Government shall be adopted which forbids the use of the exterior of said vehicles for advertising purposes."

Prior to July, 1907, the advertising signs on the exterior of the plaintiff's stages consisted of the four flags which were supple-
224 mented after May, 1907, by a few small signs on certain of the stages calling attention to points of interest on or near the route. Simultaneously with the substitution of the automobile stages the exterior signs were enlarged. To the sides of each stage were affixed signs thirteen feet long and over two feet high extending along and from the floor of the upper deck in an upright position; a sign was placed on the front over the hood running from one side of the stage to the other; a sign was placed over the hood at the back of the stage; a sign, eight feet long and about twenty inches high, followed the course of the staircase leading from the platform to the roof; a sign was also placed under the staircase and one on the riser of each of the steps and on the back of each seat on the roof of the stage. These signs advertised in various glaring colors and appropriate legends divers articles,—at first, "Duke's Mixture Smoking Tobacco," then "Bull Durham Smoking Tobacco" and at the present time, and since December, 1907, "Helmar Turkish Cigarettes." The signs now in use will serve to illustrate the general character of the exterior advertising since July, 1907. The signs on the sides of the stage represent a scene in an eastern country. At the left of the picture is a stone wall painted in a dark color with the legend "Helmar Turkish Cigarettes" in white with black shading around the letters. The wall is about four feet long; the first letter of the word "Helmar" is about twelve inches high and the last, about nine inches. The words "Turkish Cigarettes" appear in smaller letters under the word "Helmar." At the right of the picture are painted the figures of two pack camels and three men in Oriental costumes of various colors. Behind the camels and
225 nearer the extreme right of the picture are columns, and to the right of these appears a package of cigarettes, twenty inches long by sixteen inches in width with the word "Helmar" near the top and the words "Turkish Cigarettes" in smaller letters near the bottom. The picture also contains the head and bust of a woman. The remaining signs carried are of the same general character. The colors used,—green, dark blue, white, light blue, yellow, drab and various brilliant shades of red,—are contrasted so as to attract attention and are not blended so as to produce a harmonious or an artistic effect and the resulting painting constitutes a disfigurement rather than an ornament.

These signs are not a public nuisance. Under no definition recognized in this State can they be so held. Offensive to the eye though they may be; true, inartistic and unsightly though they are, they cannot be condemned as a nuisance.

Section 385 of the Penal Code reads as follows:

"A public nuisance is a crime against the order and economy of

the state, and consists in unlawfully doing an act, or omitting to perform a duty, which act or omission:

1. Annoys, injures or endangers the comfort, repose, health or safety of any considerable number of persons; or

2. Offends public decency; or

3. Unlawfully interferes with, obstructs, or tends to obstruct, or renders dangerous for passage, lake, or a navigable river, bay, stream, canal, or basin, or a stream, creek or other body of water which has been dredged or cleared at public expense, or a public park, square, street or highway; or

4. In any way renders a considerable number of persons insecure in life, or the use of property."

226 And Section 1229 of the Greater New York Charter declares:

"The word nuisance, as used in this act, shall be held to embrace public nuisance, as known at common law, or in equity jurisprudence; and it is further enacted that whatever is dangerous to human life or detrimental to health; whatever building or erection, or part or cellar thereof is overcrowded with occupants, or is not provided with adequate ingress and egress to and from the same, or the apartments thereof, or is not sufficiently supported, ventilated, sewered, drained, cleaned or lighted, in reference to their or its intended or actual use; and whatever renders the air, or human food or drink, unwholesome, are also severally in contemplation of this act, nuisances."

In Wood on Nuisances (3rd Ed., Sec. 801, p. 1177) we find this definition:

"In all cases, in order to warrant an injunction for a nuisance resulting from noise, smoke, noisome smells, etc., where there is no serious injury to property, but the application for the injunction is predicated upon the discomfort produced thereby, the discomfort must be shown to be physical, and not such as depends upon taste or imagination. It must be offensive physically to the senses, and by such offensiveness as makes life uncomfortable."

In *Bohan v. Port Jervis Gas Light Company* (122 N. Y., 18), at page 32, the term "as it is ordinarily understood" is defined as "that which is offensive and annoys and disturbs." A common or public nuisance is that which affects the people and is a violation of a public right either by direct encroachment upon public property or by doing some act which tends to a common injury or by the

227 omitting of that which the common good requires, and which it is the duty of a person to do. Public nuisances are founded upon wrongs that arise from the unreasonable, unwarrantable or unlawful use of property, or from improper, indecent or unlawful conduct working an obstruction or injury to the public and produc-

ing material annoyance, inconvenience and discomfort. Founded upon a wrong it is indictable and punishable as for a misdemeanor. It is the duty of individuals to observe the rights of the public and to refrain from the doing of that which materially injuries and annoys or inconveniences the people, and this extends even to business which would otherwise be lawful, for the public health, safety, convenience, comfort or morals, is of paramount importance, and that which affects or impairs it must give way for the general good."

The advertisements in question cannot be said to injure or endanger comfort, repose, health or safety. They do not produce any describable physiological effect. At most they are offensive to the eye and to the aesthetic taste. "It would be a dangerous undertaking" said Mr. Justice Holmes in *Bleistein v. Donaldson Lithographing Company* (188 U. S., 239, at page 251),

"for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of
228 Manet would have been sure of protection when seen for the first time * * * if they command the interest of any public, they have a commercial value—it would be bold to say that they have not an aesthetic and educational value—and the taste of any public is not to be treated with contempt. It is an ultimate fact for the moment, whatever may be our hopes for a change."

It has been held that public aesthetics may be effectuated under the exercise of the right of eminent domain (*Atty. Gen. v. Williams*, 174 Mass., 476). But that object cannot be accomplished by legislation through police power, without compensation. That power is confined to the protection of public safety, health and morality. The use of bill boards on private property may not be interfered with no matter how serious a public eyesore may resuult. (*People v. Green*, 85 App. Div., 400; *New Jersey &c. Co. v. Atlantic City*, 56 Atl. Rep., 342; *Passaic v. Patterson &c., Co.*, 62 Atl., 267; *Chicago v. Gunning System*, 73 N. E. Rep., 1035 (111).

Civic pride has prompted the preservation of many streets and other localities against every invasion which would tend to destroy, injure or detract from their beauty or general artistic appearance. Public aesthetics has dictated the selection and development of parks and the erection and decoration of buildings,—natural beauty being the standard for the former and artistic excellence for the latter. And we are not without statutory direction that certain aesthetic features be protected (Section 612 of the Greater New York Charter.) In *Tompkins v. Pallas*, (47 Misc., 309), which was an action brought to enjoin the use of a fence enclosing a portion of
229 one of the City parks for billboard advertising purposes, Mr. Justice Scott wrote as follows:

"A public park has been defined by the Court of Appeals as 'a piece of ground enclosed for purposes of pleasure, exercise, amusement, or ornament' (*Perring v. New York, etc., R. Co.*, 36 N. Y., 120), and commissioners charged with the care of such parks have often been held justified in granting licenses for the maintenance within parks of such conveniences as would enhance the opportunities of the public to use and enjoy the parks as places of resort, amusement, recreation, and exercise. In every case, however, in which the exercise of this power has been sustained it has been because of the use authorized has in some way contributed to the use and enjoyment of parks by the public. The defendant Pallas gives in his affidavit opposing this motion a list of some of the licenses heretofore granted with respect to the City's parks, including restaurants, refreshment stands, boats, stages, boathouses and flower-stands. This very list of itself shows that heretofore the issue of licenses has been limited to objects which would tend to afford additional facilities for the beneficial use and enjoyment of the parks by the public, and have come to be generally recognized as appropriate aids to the full enjoyment of public pleasure grounds. No such claim can be made for the advertisements of which the plaintiff complains. It is too obvious to require demonstration that business advertisements painted upon a board fence contribute nothing to the beneficial use of the park by the public."

In *United States v. Gettysburg El. Ry. Co.* (160 U. S. 668), where it was sought to appropriate lands in order to fix and preserve the lines of battle at Gettysburg, the Supreme Court of the United States by Mr. Justice Peckham, say:

230 "No narrow view of the character of this proposed use should be taken. Its national character and importance, we think, are plain. The power to condemn for this purpose need not be plainly and unmistakably deduced from any one of the particularly specified powers. Any number of those powers may be grouped together, and an inference from them all may be drawn that the power claimed has been conferred.

It is needless to enlarge upon the subject, and the determination is arrived at without hesitation that the use intended as set forth in the petition in this proceeding is of that public nature which comes within the constitutional power of Congress to provide for by the condemnation of land."

The breadth and spirit of that language sounds a keynote in the tendency of the courts to recognize a public sentimental or æsthetic purpose as a basis for judicial action. In this manner have scenic wonders been protected and preserved against the vandalism and greed of private interests and natural beauty sites have been developed simply because of civic pride, public æsthetics and patriotic sentiment. These localities are oftentimes improved by such artistic touches as tend to produce an effect both pleasing and satisfactory. Their influence is uplifting as well as educational. They are designed to produce mental health. Their beneficial æsthetic effect is

never questioned. They stimulate civic pride, cultivate to a high degree the æsthetic taste of those whose tastes are in process of formation and in the end advance the public spirit of patriotism. Such an end justifies any proper and permissible means.

When we attempt to apply these principles to the use of
231 private property, however, or to such facts as are here disclosed, we are at a loss for precedent, although judicial tendency has been to some extent affected by the same spirit of æsthetics which has prompted the preservation and improvement of places of public interest.

In *Pears v. Manhattan Railway Company* (unreported) Judge Daly recognized and commented upon the disfigurement of the elevated railway stations by signs which sacrificed an effect designed to be architectually pleasing.

It may be doubtful whether the evil of unsightly advertisements could be effectually controlled save through a constitutional amendment.

Fifth avenue from Washington square to Twelfth street is devoted almost exclusively to residences; from Twelfth to Forty-eighth street a large number of business houses of the higher class have crept in; from Forty-eighth to Fifty-ninth street it is devoted to churches, residences, clubs and hotels, and north of Fifty-ninth street with practically no exceptions, the buildings are private dwellings. At Washington square it enters a public park and at Fifty-ninth street, it furnishes one of the principal entrances to Central Park along which it extends from Fifty-ninth to One Hundred and Tenth street. In the erection of buildings, whether for church, business or residential purposes, architectural symmetry has been preserved to such a degree that the avenue has become a municipal landmark. Civic pride has prompted the protection of the thoroughfare from all unnecessary commercial use and traffic. And although the mercantile invasion with its consequent disfigurement has tended to mar the picture, Fifth avenue has, nevertheless maintained a general
232 appearance of architectural superiority. It is amid such scenes as this that the plaintiff's advertising panorama of brilliant signs moves. It is along the avenue of churches that on Sunday these glaring billboards are driven. It is this scheme of beauty which is sacrificed to the demands of modern commercialism. It is along this entrance to parks and along the parks themselves, preserved to attract lovers of nature and of the beautiful, that these unnatural and inartistic moving-picture signs are displayed. But out of place, disagreeable and offensive though they are both to civic pride and æsthetic taste and although the tendency of equity jurisprudence is to extend the court's jurisdiction to include this situation the ultimate fact remains that no authority now exists which will justify the legal conclusion that the plaintiff's signs constitute a nuisance.

Let us now consider whether the plaintiff has such a clear legal right as would authorize equitable protection.

In July, 1907, the defendant, through its Police Department, sum-

moned the plaintiff's superintendent before a Magistrate for violating section 41, chapter 2, article IV, Part II, of the Code of Ordinances of the City of New York which reads:

"No advertising trucks, vans or wagons shall be allowed in the streets of the Borough of Manhattan, under a penalty of ten dollars for each offense. Nothing herein contained shall prevent the putting of business notices upon ordinary business wagons, so long as such wagons are engaged in the usual business or regular work of the owner, and not used merely or mainly for advertising."

This ordinance resulted from the re-enactment, without
233 substantial alteration, of prior ordinances in existence since 1882, and its adoption was authorized by Section 50 of the Greater New York Charter which empowered the Board of Aldermen "to regulate the use of streets and sidewalks by foot passengers, animals or vehicles; to regulate the speed at which vehicles shall be driven or ridden and at which vehicles shall be propelled in the streets; * * * "To regulate the exhibition of advertisements or handbills along the streets; and to make all such regulations in reference to the running of stages, omnibuses, trucks and cars as may be necessary for the convenient use and the accommodation of the streets, piers, wharves or stations."

The proceeding before the Magistrate was dismissed upon a technicality and the parties remitted to a civil action.

Thereafter the plaintiff was notified by the Corporation Counsel that the exhibition of these exterior signs was unauthorized and illegal and that they would be so treated by the various City departments. Thereupon this action was commenced. The plaintiff alleges the peculiar adaptability of the exterior of its automobile coaches for advertising; that the income received from the advertising company is $10,000 per annum plus the sum of $200 per stage; that the defendant threatens and intends to prevent the maintenance of the exterior advertising signs; and that such interference is in derogation of its franchise and constitutional rights. Upon those allegations it seeks equitable intervention.

The plaintiff secured temporary relief under an order to show cause granted August 30, 1907, containing a preliminary injunction which to the present time has stood unchallenged.

234 The position taken by the defendant aside from the question of nuisance, is: (1) That the plaintiff is not authorized either by statute, by its charter or by custom to engage in exterior advertising; (2) That the signs are violative of Section 41, Chapter 2, Article IV, Part II, of the Code of Ordinances of the City of New York passed to permit the valid exercise of police power vested in the defendant under its charter.

The plaintiff contends: (1) That the right to use the outside of its stages for carrying advertising matter is incidental to its right to transport passengers; (2) That the defendant's threatened interference is not a lawful exercise of police power; (3) That the ordinance does not include the plaintiff; (4) That even though it does include

the plaintiff, it could not be invoked for the reason that the plaintiff's franchise, having been granted by the Legislature, cannot be annulled or restricted by the defendant, and the display of advertisements being merely an incident to the franchise, the defendant has no greater power to interfere with the incidental right than with the franchise itself; (5) That the adoption of the ordinance was unauthorized; (6) That the ordinance prevents the lawful use of private property; and (7) is unconstitutional.

The first question presented is whether the plaintiff is authorized either by law or under its charter to devote the exterior of its stages to advertising.

In 1885 the Fifth Avenue Transportation Company (Limited) was incorporated for the following certified objects:

"To carry passengers and property for hire, in all kinds of
235 vehicles drawn by horses, excepting tram-cars; to establish, maintain and operate stage or wagonette routes for public use in the conveyance of persons and property; to take and convey persons and property in stages or wagonettes and to provide and run the necessary stages or wagonettes, or both, upon its routes for the public use; and to receive compensation therefor upon acquiring authority to establish, maintain and operate such routes; and to keep on livery, and for its own use, and for hire for others to use, horses, harness and all kinds of vehicles drawn by horses, excepting tram-cars; to deal in horses and to manufacture and deal in harness and all kinds of vehicles drawn by horses, excepting tram-cars; and all kinds of merchandise and commodities pertaining to or incidentally connected with, or necessary and useful in the business aforesaid or which can be made or dealt in profitably in connection with said business, or any and all of its branches; to purchase, lease, hold, use, sublet, sell and exchange all such real estate and other property as may be necessary or convenient for the establishment, maintenance and operation of its business and the erection and maintenance of building and other accommodations, necessary to fully accomplish the objects of its incorporation, including stables, blacksmith shops and farrieries in connection with such stables, and all necessary and useful buildings, fixtures and machinery for the accommodation of its passengers, freight and parcels."

In the succeeding year the Legislature passed Chapter 536 of the Laws of 1886 entitled

"An Act to authorize the Fifth Avenue Transportation Company (Limited) or its assigns to run stages on Fifth Avenue through Washington Park and through South Fifth Avenue to Bleecker Street Elevated Railway Station in the City of New York, and return."

236 By "Section 1" thereof it was enacted:

"That the Fifth Avenue Transportation Company (Limited) a company organized under the laws of the State of New York, and its assigns, be and they are hereby authorized on pay

ment of the license fees as hereinafter provided, to run and drive, or cause to be run and driven, and without further authority from said city, a line of stages, or carriages, for the transportation of passengers, for hire, from Eighty-ninth street in the City of New York, down Fifth Avenue, across Washington Park, and along South Fifth Avenue to the Bleecker Street Elevated Station and return, provided that the consent thereto in writing of a majority of the owners of the property on the avenue and streets wherein such stages or carriages are hereby authorized shall have been obtained and filed with the Mayor of said city."

A consent in writing signed by the requisite number of property owners, along the proposed route, was duly filed pursuant to Section 1947 of the "New York City Consolidation Act of 1882."

By Chapter 182 of the Laws of 1889 it was enacted "that the Fifth Avenue Transportation Company (Limited), a corporation organized under the laws of the State of New York, and its assigns be and are hereby authorized, * * * to run, drive, or cause to be run or driven, and without further authority from said city, a line of stages or carriages for the transportation of passengers and parcels for hire."

In February, 1895, in an action brought by The People of the State of New York against the Fifth Avenue Transportation Company (Limited), judgment was entered decreeing the dissolution of that company and a distribution of its property and appointing a receiver for the latter purpose. Thereafter the receiver was authorized by an order of the court "to continue the running of the stage line of said corporation and the vehicles for hire for passengers on special occasions, until the sale of the right to run such stages and stage line be had, or until the further order of the Court in the premises."

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In July, 1895, an order was entered which provided that all the rights conferred on the Fifth Avenue Transportation Company (Limited) by Chapter 536 of the Laws of the State of New York, passed June 2nd, 1886, and by Chapter 182 of the Laws of the State of New York, passed in the year 1889, and all the other property of the corporation, be sold at public auction under the direction of the Receiver.

In October, the Receiver reported the sale of the property and rights to one Ward Campbell and upon that report judgment of confirmation was entered. Thereafter a bill of sale was executed and delivered by the Receiver whereby he sold and conveyed to Ward Campbell in addition to specified chattels "all the right to run and drive, or cause to be run and driven, a line of stages or carriages for the transportation of passengers for hire from Eighty-ninth street in the City of New York, down Fifth Avenue, across Washington Park, and along South Fifth Avenue to the Bleecker Street Elevated Station and return, together with all the rights granted to Fifth Avenue Transportation Company, Limited, or ac-

quired by, under or by Chapter 536 of the Laws of 1883,
238 and all the rights granted to or acquired by said Fifth Avenue Transportation Company, Limited, under or by Chapter 182 of the Laws of 1889."

In July, 1896, the plaintiff, Fifth Avenue Coach Company, was incorporated "to take and possess the property and franchises" of the Fifth Avenue Transportation Company (Limited), sold to Ward Campbell; and in November, 1897, the latter by bill of sale transferred to the plaintiff "all of said rights, licenses, privileges, franchises and properties," which he acquired by purchase from the Receiver of the Fifth Avenue Transportation Company. The plaintiff thereby became vested with all the original rights, privileges and franchises possessed by that Company. (*Matter of Long Acre Electric Light & Power Co.*, 188 N. Y., 361).

A corporation is not a tangible being. It becomes a legal entity by statutory permission. It is a mere legislative fiction; a creature of the law existing only by virtue of legislative enactment. Its powers, like its corporate life, are derived from the legislature and the measure of its powers is found in the charter which gives it existence. Although strict construction has resulted in the formulation of the rule that only the powers granted may be exercised, the rigidity of that rule has been relaxed and the rule itself qualified by the application of a more modern principle which recognizes not only the express powers but those which attach as necessary incidents to, and which may reasonably be implied from, the powers specifically conferred. But in the main the rule of strict construction prevails. Especially is this true in the case of public
239 and quasi-public corporations, of which latter class the plaintiff is a member. And the reason is plain. The powers and privileges of these corporations are conferred, not for the private purposes of the corporators, but for public purposes and to promote public interests. They are granted at the public expense since they bestow advantages not possessed by those not incorporated. The public benefit is compensation for the grant and the grant is made in contemplation of that benefit. There is, therefore, a strong presumption that the legislature, in conferring corporate powers, has carefully considered the interests of the public and has granted only such powers as public interests require. When corporations are permitted to usurp and exercise powers not conferred, it is at the expense of the public. The demand, therefore, that they be kept within their chartered limits is dictated by public policy [*Bissell v. Mich S. & N. I. R. Co.*, 22 N. Y., 258].

But the courts have recognized that certain incidental powers must necessarily attach to, or reasonably be implied from, the express grant, in order to enable a corporation to exercise the powers conferred and to accomplish the objects for which the corporation was created. So that the rule which now prevails is that corporations possess only such powers as are expressly granted by legislative enactment together with such others as are necessarily or fairly implied

in or are incidental to the powers thus granted or essential to the declared objects and purposes of the corporation.

The only exception to this rule is furnished by private corporations which may exercise many extraordinary powers pro-
240 vided all its stockholders assent and none of its creditors are injured. Under those circumstances, there is no one to complain except the State, and, the business being entirely private, the State does not interfere [*Martin v. Niagara Falls &c. Co.*, 122 N. Y., 165].

The broadest enunciation of the rule is found in *Brooklyn Heights R. R. Co. v. City of Brooklyn* [152 N. Y., 244, 250], where the Court of Appeals, by Gray, J., says:

"When we speak of what a corporation may, or may not, do within its grant of powers, we have in mind the reasonable intendments of its charter, as well as its clear expressions of authority. We search, in a doubtful case of an exercise of power, not in terms conferred, for what may be deemed to be reasonably implied as a means of carrying out the powers specifically given and so as to permit of the amplest exercise thereof, which is consistent with the object and purpose of the public grant. A railroad corporation is, particularly, called upon to consult the public convenience and what is done by it in that direction should be sustained if support for the acts is possible to be found in the law of its being. If a reasonable necessity exists, in a proper discharge of its duties to the public, for the act complained of, that should be a sufficient answer to the complaint."

This does not alter the general principle that public corporations possess only those powers which are necessary to the accomplishment of their limited and well-defined objects. And if this principle is important as a general rule of municipal law, it is of the highest importance in this State where corporations have been extended and multiplied so as to embrace almost every object of human concern.

Public corporations are created for certain limited and specific
241 purposes; therefore, their general powers should be restricted by the declared objects of their institution; and their incidental powers should be extended only as a means of consummating those objects.

An incidental power is defined to be one that is directly and immediately appropriate to the execution of the specific powers granted, and not one that has only a slight or remote relation thereto. An incidental power exists merely for the purpose of enabling a corporation to carry out the powers expressly conferred and to accomplish the purpose of its existence; it can never avail to enlarge the express powers, and thereby warrant the corporation to devote its efforts and its capital to purposes other than those which its charter expressly authorizes, or to engage in collateral enterprises, not directly, but only remotely connected with its specific corporate objects.

An act, in order that the power to perform it may be implied, must tend directly and immediately, and not slightly or remotely, to accomplish the object for which the corporation was created [Am. & Eng. Ency. Law, VII, p. 700].

Implied powers must result from the charter by necessary implication, regard being had to the purposes of the corporation, and if there is any uncertainty or doubt as to the terms and intendment of the charter, it must be resolved against the corporation. Whether or not the implied powers of a corporation authorize it to engage in an undertaking or enterprise not directly related to the declared objects of the charter depends, not upon the question whether the particular enterprise would have a tendency to increase the legitimate corporate business, but upon the question whether the exercise of such
242 authority, in view of the circumstances, is reasonably necessary to the proper prosecution of that business. When the words used in the charter admit of different meanings one of which would abrogate, restrict or abridge the independent rights, profits or facilities of the public, the meaning most favorable to the public interests and most adverse to the corporation will be adopted because the latter "in bargaining with the public" ought to be careful to express distinctly what is intended [*Camblos v. Philadelphia, &c., R. R. Co.*, Fed. Cases, No. 2, 331].

Corporations, however, from whatever cause, frequently overstep the well-defined boundaries of their charters within which their acts and undertakings should be confined and attempt the exercise of unauthorized powers. To this tendency is attributed the evolution of the doctrine of *ultra vires*. The term *ultra vires* is the modern legal nomenclature for acts of a corporation through any of its instrumentalities which are beyond the powers conferred by law upon the legal entity. A corporation has no natural or inherent rights or capacity. Brought into being by legislative enactment, it has such powers as the State sees fit to give it,—nothing more. When it assumes to act beyond those powers, the asumption is void, the act a nullity and any resulting contract *ultra vires*.

Perhaps the most general statement which can be made of the doctrine of *ultra vires* is to say that a contract of a corporation which is unauthorized by, or in violation of, its charter or other governing statute, or entirely outside the scope of the purpose of its crea-
243 tion, is void, "in the sense of being no contract at all, because of a total want of power to enter into it." [10 Cyc., 1146.] And in "France on Elements of Corporation Law" it is said that:

"The transaction may be beyond the powers of the corporation, simply because it is foreign to the purposes expressed or implied in the charter; it may invoke the exercise of a power, not forbidden, but simply ungranted, as, for example, where a railroad undertakes to guarantee the expenses of a public festival. In the better usage, the term *ultra vires* is limited to acts of the latter class, and many of the courts make a distinction between transactions which are illegal, because forbidden, and those which are simply in excess of the granted powers."

The illustration referred to by the author is based on the decision in *Davis v. Old Colony R. R. Co.*, [131 Mass., 258], where Chief Justice Gray after a most elaborate examination and exhaustive analysis of more than fifty authorities, said:

"The corporation has power to do such business only as it is authorized by its act of incorporation to do, and *on* other. It is not held out by the government nor by the stockholders as authorized to make contracts which are beyond the purposes and scope of its charter. It is not vested with all the capacities of a natural person, or of an ordinary partnership, but with such only as its charter confers. If it exceeds its chartered powers, not only may the government take away its charter, but those who have subscribed to its stock may avoid any contract made by the corporation in clear excess of its powers. If it makes a contract manifestly beyond the powers conferred by its charter, and therefore unlawful, a court of chancery, on the application of a stockholder, will restrain the corporation from carrying out the contract; and a court of common law will sustain no action on the contract against the corporation. * * *

The holding of a 'world's peace jubilee and international musical festival' is an enterprise wholly outside the objects for which a railroad corporation is established, and a contract to pay, or to guarantee the payment of, the expenses of such an enterprise, is neither a necessary nor an appropriate means of carrying on the business of the railroad corporation, is an application of its funds to an object unauthorized and impliedly prohibited by its charter, and is beyond its corporate powers. Such a contract cannot be held to bind the corporation, by reason of the supposed benefit which it may derive from an increase of passengers over its road, upon any grounds that would not hold it equally bound by a contract to partake in or to guaranty the success of any enterprise that might attract population or travel to any city or town upon or near its line."

In *Bath Gas Light Company v. Claffy* [151 N. Y., 24] the Court of Appeals by Andrews, Ch. J., says:

"The modern doctrine as stated by Chancellor Kent is to consider corporations as having such powers as are specifically granted by the act of incorporation, or as are necessary for the purpose of carrying into effect the powers expressly granted, and as not having any others [2 Kent, Comm., 299].

This doctrine is embodied in the Revised Statutes of New York, and the section relating to the subject is regarded simply as declaratory of the antecedent law. [1 Rev. St., 600 § 3.] It has been frequently stated that the validity of contracts of corporations is to be determined by comparing the contract made with the charter and if upon such comparison it appears that the contract was neither expressly authorized, nor a necessary or reasonable incident to the exercise of the powers specifically granted, the contract is *ultra vires*.

In *People ex rel. Tiffany Co. v. Campbell* [144 N. Y., 166] the Court, by Andrews, Ch. J., says:

"It is claimed that the purchase and sale of goods not manufactured by the relator, merely to complete its stock, and limited to articles which it could not advantageously manufacture itself, was in-

cidental and subsidiary to the exercise of its corporate power as a manufacturing company, and therefore, within the power granted. It is well settled that a corporation possesses not only powers specifically granted in terms, but [as expressed in the Revised Statutes] such power 'as shall be necessary to the exercise of the powers so enumerated and given.' [1 Rev. Stat., 600, § 3.] The unexpressed and incidental powers possessed by a corporation are not limited to such as are absolutely or indispensably necessary to enable it to exercise the powers specifically granted. Whatever incidental powers are reasonably necessary to enable it to perform its corporate functions are implied from the powers affirmatively granted. [Comstock, J., in Curtis *v.* Leavitt, 15 N. Y., 64.] But powers merely convenient or useful are not implied if they are not essential, *having in view the nature and object of the incorporation.* The power assumed by the relator in this case to supply from other sources goods which it could not itself profitably manufacture, was a convenient and useful one, and doubtless contributed to the success of the general business, but it cannot, we think, be said to be essential to its business as a manufacturing corporation."

In *Chapman v. Lynch* [156 N. Y., 551] a contract, by a business corporation organized under the Act of 1875 for the manufac-
246 ture of salt, to receive money upon deposit for a special account, was held to be *ultra vires.*

In *Schurr v. N. Y. & B. S. I. Co.* [45 St. Rep. 645] Mr. Justice Pryor said:

"Upon the point of competency of the defendant to make the contract, the argument of respondent is 'That the object of the corporation being to improve, sell, and lease real estate, a contract with plaintiff to organize stock companies on its land so as to increase its value, is certainly not *ultra vires.*' Notwithstanding the confidence with which the conclusion is announced we are of the opinion that it is a *non sequitur.*" * * *

"That authority to engage in the business of organizing other corporations is neither necessary or incidental to the charter objects of the defendant company is a proposition too plain for plausible dispute. No doubt the erection of factories on defendant's land would tend to enhance its value; but obviously, not any and everything that so tends is necessary or incidental to the charter objects of the corporation."

Section 10 of the General Corporation Law reads in part: "No corporation shall possess or exercise any corporate powers not given by law or not necessary to the exercise of the powers so given."

In *Jacksonville Ry. v. Hooper* [160 U. S. 514] the Supreme Court of the United States say:

"To lease and maintain a summer hotel at the seaside terminus of a railroad might obviously increase the business of the company and the comfort of its passengers, and be within the provisions of

the statute of Florida above cited, whereby a railroad com-
247 pany is authorized 'to sell, lease, or buy any land or real estate not necessary for its use' and to 'erect and maintain all convenient buildings * * * for the accommodation of their passengers.'

Courts may well be astute in dealing with efforts of corporations to usurp powers not granted them, or to stretch their lawful franchises against the interests of the public, nor would he be understood to hold that, in a clear case of the exercise of a power forbidden by its charter, or contrary to public policy, a railroad company would be estopped to decline to be bound by its own act, even when fulfilled by the other contracting party [Davis *v.* Old Colony Ry. Co., 131 Mass. 258; Thomas *v.* R. R. Co., 101 U. S. 71; Central Transportation Co. *v.* Pullman Car Co., 139 U. S. 24.] * * *

We do not seek to relax, but rather to affirm the rule laid down by this court in Central Transportation Co. *v.* Pullman Car Co. [above cited] that 'a contract of a corporation, which is *ultra vires*, in the proper sense, that is to say, outside the object of its creation as defined in the law of organization, and, therefore, beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect—the objection to the contract is not merely that the corporation ought not to have made it, but that it could not make it. Such a contract cannot be satisfied by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it."

In *Worden v. New Bedford* [131 Mass., 23]. The Court say:

"But the defendant contends that a city or town has no power to let its public buildings for private uses, that the letting to the poultry association, if made by the city, was *ultra vires*, and, therefore,
248 it is not liable. This ground is untenable. The city could not erect buildings for business or speculative purposes, but having a city hall, built in good faith and used for municipal purposes, it has the right to allow it to be used incidentally for other purposes, either gratuitously or for compensation. Such a use is within its legal authority, and is common in most of our cities and towns. [French *v.* Quincy, " Allen 9.]

The courts of this State have modified the rule when applied to executed contracts [*Whitney Arms Co. v. Barlow*, 63 N. Y., 62], and the modern interpretation is stated in *Vought v. Eastern B. & L. Assn.* [172 N. Y. 508, 511].

There has been no relaxation, however, of the *principle*. Although the courts are astute to prevent inequity when the rights of innocent parties, dealing with a corporation, are involved, they do not sanction the commission or the continuance of *ultra vires* acts.

Public corporations, organized for public benefit, owing the public a duty in return for their franchises are held within their powers by means of this salutary principle of *ultra vires*.

The plaintiff is a quasi-public corporation. It was chartered and is operated for the accommodation of the public as well as for the

benefit of its stockholders. It is privileged by franchise to make a specific use of the streets, not common to others, and which may not be exercised except under State grant.

The powers granted by the charter under which the plaintiff acquired its existence are limited to the carriage of persons and property for hire. No claim is made that there is any express authority in the charter to engage in the business of exterior advertising.

249 But it is contended that such authority impliedly exists as an incident to the powers expressly granted. The maintenance of exterior advertising signs is not necessary to the exercise of the plaintiff's corporate powers, or the performance of its corporate duties or to the accomplishment of the objects and purposes of its incorporation. On the contrary it is an independent enterprise entirely foreign to and disassociated from the plaintiff's chartered business. It does not tend to promote the comfort or convenience of the passengers or affect any improvement in the traffic facilities. Therefore, the right to carry exterior signs is not in any manner incidental to the plaintiff's right to carry passengers. With equal propriety could it be held that an advertising company could devote its delivery wagons to the purposes of a common carrier; or that a public corporation is authorized to engage in any business, however distant from that for which it was organized.

I am referred to no decision supporting,—and research has failed to disclose any authority for,—the plaintiff's contention that exterior advertising on public conveyances is incidental to the exercise of the powers of common carriers. The adjudicated cases have gone no further than to recognize and sanction the right of certain railroad corporations to display advertising signs in their stations or to establish an enterprise which, while not directly authorized by the charter, promoted the comfort and convenience of passengers, thereby contributing to the legitimate corporate business, merely because the exercise of these added privileges had become established by custom. Thus in *Interborough Rap. Tran. Co. v. City of New*

250 *York* [53 Misc., 126] the right of the Subway Company to rent space for advertising signs and weighing machines in the subway stations was challenged. A preliminary injunction was granted [47 Misc., 221] which, after trial, was made permanent upon the ground that the right to maintain news stands, vending and weighing machines and advertising signs in stations is, as an incident to the operation of railways, based upon a practically universal custom.

To the same general effect are *Flanagan v. The Gt. Western Ry. Co.* [L. R. 7 Eq., 116] and *Holmes v. Eastern Counties R. R.* [3 Kay & J., 675].

But in this case no custom has been established in support of the plaintiff's alleged right to carry signs on the outside of its stages. Some evidence was adduced that between the years 1850 and 1854 small signs were displayed upon stages operated in Grand street, advertising places of amusement and commercial houses in or near the vicinity of the stage route; that advertising is permitted in the

subway stations and on the platforms of elevated railroad stations and upon and under the stairways leading thereto; that on certain horse-propelled cars small advertising flags are displayed, and that placards relating to points of public interest are affixed to the dashboards of a few trolley cars; that prior to the installation of the present automobile stages, the horse-drawn stages operated by the plaintiff bore signs advertising theatres and other points of interest along the route. That evidence does not establish the custom for which the plaintiff contends. It does not show that the *exterior* of the elevated cars, the subway cars, or the streets cars is utilized for the display of advertising signs, but proves the contrary.

251 In *Pears v. Manhattan Ry. Co.*, where the right of the railway company to permit signs to be placed on the exterior of the stations and towers of the elevated railroad was in issue, it was held that the company had no power under its charter, either to engage directly in the advertising business or to do so indirectly by leasing its structures for posters and advertisements which had no connection with the business of the company, or the convenience of passengers. Furthermore, that the stations of the railway company were built upon the public streets of the city, the use of which had been granted to the company for certain specific purposes; and that the maintenance of advertising signs was an attempted use of the public streets for a private purpose, not authorized by law.

In *Pittsburg & Birmingham Traction Company v. Seidell* [6 Pa. Dist., 414], the right of a public corporation to engage in advertising and to carry signs upon and in its cars was considered and the right for which the plaintiff here contends was ruled against in this language:

"The plaintiff has not only the right to carry passengers, but it also has a right to do anything necessary for the convenient carrying out of the purposes for which it was chartered, and whatever is fairly incidental thereto. * * *

We are unable to see why the business of advertising for pay comes within any of the rules given as to the power of such corporation.

It is not necessary for carrying out any of the powers or purposes for which these corporations were chartered nor is it incidental thereto. It is not conducive to the comfort or safety of the passengers, or to their convenience, any more than would be printing a newspaper or opening a banking business."

252 There is no analogy between the present case and that of *New York Mail and Newspaper Transportation Co. v. Shea* [30 App. Div., 265]. There the trustees of the Brooklyn Bridge were permitted to use the bridge, public property, to instal pneumatic tubes along the structure, in accordance with a practice which the Legislature had sanctioned [Chap. 563, L. 1887].

The plaintiff was incorporated to serve the public as a common carrier for hire. It is authorized to use the public streets for that specific public purpose. The leasing of the exterior of its vehicles for advertising is an unauthorized use of the streets for a private pur-

pose. Such a special and peculiar use has been condemned even after it has received the stamp of municipal approval. [*Hatfield v. Straus*, 189 N. Y., 208; *State ex rel. Belt v. St. Louis*, 161 Mo., 371.] The use of the exterior of the stages is not a stage use; it is not in furtherance of the corporate objects; it is not necessary to the performance of any corporate duty; it is not an element in the consummation of any purpose for which the corporation was formed; it is a distinct and separate enterprise unrelated to the duties and objects of the plaintiff as a common carrier.

The cases cited by the plaintiff [*French v. Quincy, supra; Spaulding v. Lowell*, 23 Pickering, 71; *Worden v. New Bedford, supra; People v. Plattville*, 71 Wis., 139; *Flanagan v. The Gt. Western Ry. Co., supra; Holmes v. Eastern Co. R. R., supra; Brown v. Winnisimmett Co.*, 11 Allen, 326; *Forrest v. Manchester Ry. Co.*, 30 Beav., 40] outline principles with which I am in full accord but they are not authorities for the plaintiff's contention.

253 The fact that the plaintiff receives a substantial income from the Advertising Company is without weight. The court will not approve an unauthorized act merely because it is a source of profit to the wrong-doer.

It is true, as the plaintiff argues, that the owner of property has the right to use it without restraint, provided the property, health, physical comfort and morals of others and of the public are not injured by such use. But that principle does not apply to public corporations using the streets for a specific purpose under a limited franchise granted by the State.

It is likewise true that the plaintiff's charter cannot be annulled or restricted by the defendant and that the defendant has no power to interfere with any right which is incidental to the charter; but that principle is also inapplicable in view of the fact that the maintenance of the plaintiff's signs is not an incident to its franchise.

The plaintiff challenges the power of the Board of Aldermen to pass the ordinance under which the defendant asserts its right to remove the advertising signs. Section 50 of the Greater New York Charter empowers that Board "to regulate the use of streets and sidewalks by foot passengers, animals and vehicles" as well as "the exhibition of advertisements or handbills along the streets," and to "make, establish, alter, modify, amend and repeal all ordinances" necessary to that end. The power thus conferred is sufficient authority for the adoption of the ordinance.

The plaintiff argues that the power to regulate does not include the power to prohibit, and cites *Peace v. McAdoo* [110 App. Div., 13]. That case, however, arose under Section 315 of the Charter which empowered the Police Department to "regulate the

254 movements of teams and vehicles in streets, bridges, squares, parks and public places," and the Court said:

"The very idea of a street imports the right of the general public to pass and re-pass thereon throughout all parts thereof. In People *v.* Kerr [27 N. Y., 188, 194], the court says: 'The right of the public, that is, of the people of the state, in a street or highway, is a

right of passage. In the ordinary use of the highway it is a right to pass and re-pass over its surface on foot or in carriages at pleasure.' In Smith *v.* McDowell [148 Ill., 51], it is said: 'The municipality in respect of its streets is a trustee for the general public and holds them for the use to which they are dedicated. The fundamental idea of a street is not only that it is public, but that it is public in all its parts for free and unobstructed passage thereon by all persons desiring to use it., * * *

The right of regulation is restricted to the 'movement of teams and vehicles in streets' etc.

This expression recognizes the existence of such a thing, and such movement in every part of a street is a public right. If, under the guise of a regulation, that movement is forbidden in any part of a street, there is, of course, an impairment of the right—a *pro tanto* prohibition against its exercise."

Here the plaintiff is attempting to exercise unauthorized privileges not common to the public and the ordinance does not, therefore, impair any right. Furthermore, there is a wide distinction between the power given to the Police Department to *regulate traffic* and that granted to the Board of Aldermen to regulate the *use of the streets.*

The ordinance is constitutional.

As I have shown, no right exists in the plaintiff to engage
255 in exterior advertising and the contracts having that object in view are *ultra vires.* Therefore, any ordinance designed to prevent the display of the plaintiff's signs could not be held to deprive it of its property without due process of law—or to deprive it of the equal protection of the laws within the meaning of the Fourteenth Amendment of the Constitution of the United States or to impair the obligation of its contracts.

The discrimination which the tariff claims is affected by this conclusion, has no existence in fact. There is not a scintilla of evidence that any common carrier anywhere enjoys the privilege of displaying on the outside of its vehicles signs similar to those carried by the plaintiff's stages or even approaching them in similarity. The ordinance is broad and bears equally upon all public and quasi-public corporations.

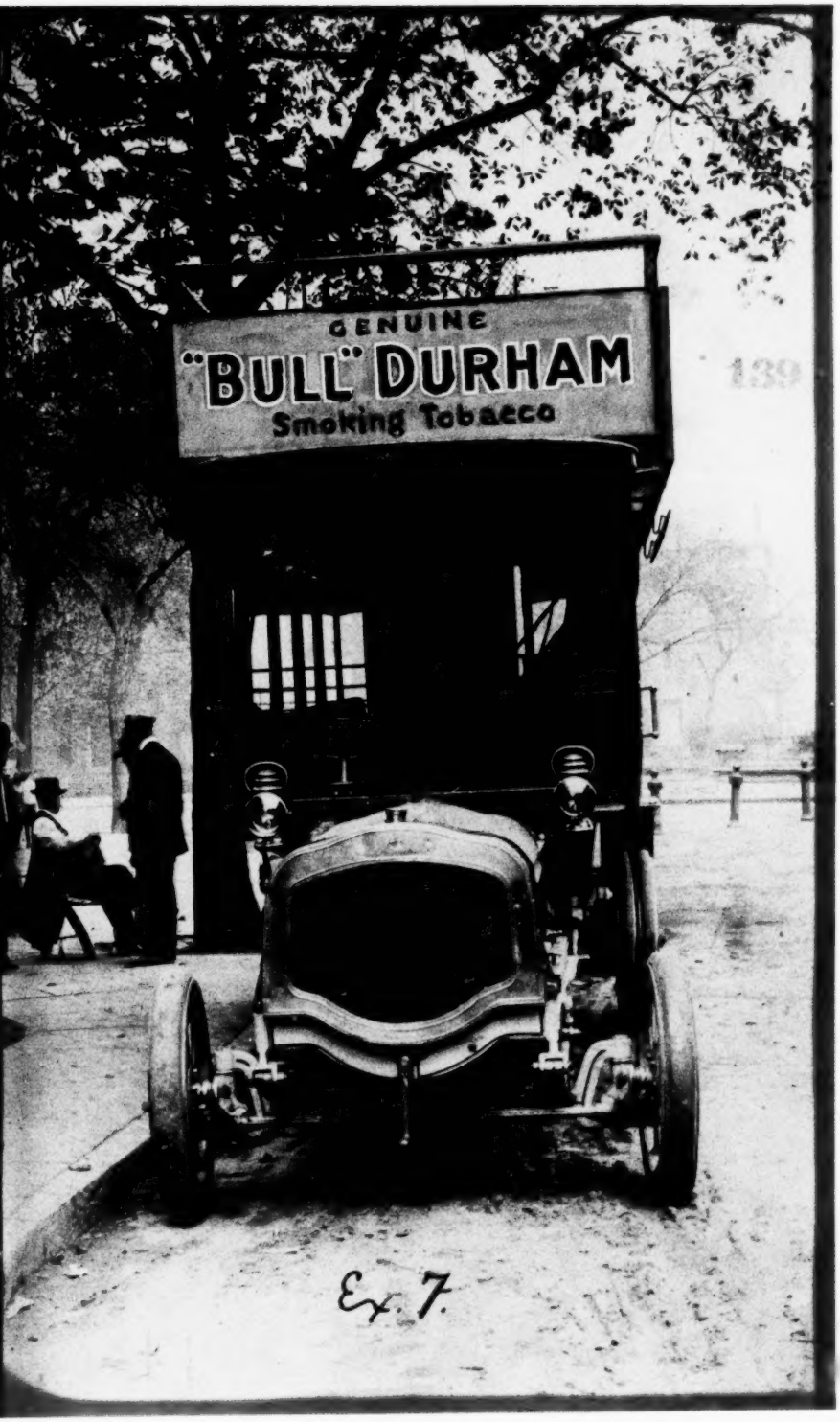
But the plaintiff maintains that its vehicles are not "advertising trucks, vans or wagons." If it were necessary to decide that question, I would be inclined to the conclusion that the term "wagon" contained in the ordinance embraces the plaintiff's stages. It has been held that the word "wagon" is a generic term including every other species of vehicle by whatever name they may be called. [*Cordon v. Shields,* 7 Kan., 320, 325; *Luce v. Hassam,* 76 Vt., 450.] But this case must be disposed of upon broader grounds which defeat the right of the plaintiff to any equitable relief.

The plaintiff has assumed the burden of establishing the existence of facts which justify protective intervention by the court. It has not only failed to sustain that burden, but has shown itself to be engaged in the commission of acts unauthorized by law. Under these

circumstances it asks that its illegal acts be,—not only ap-
256 proved,—but perpetuated by judicial sanction against possible future lawful interference. Equity will not stay the hand of the law under such circumstances. It follows that the complaint must be dismissed on the merits.

The plaintiff will combine the proposed findings and conclusions which have been approved together with those which have been prepared to support the ground upon which the disposition of the case is based and present a new decision for signature.

(Here follow photographs marked pp. 257 to 267, inclusive.)



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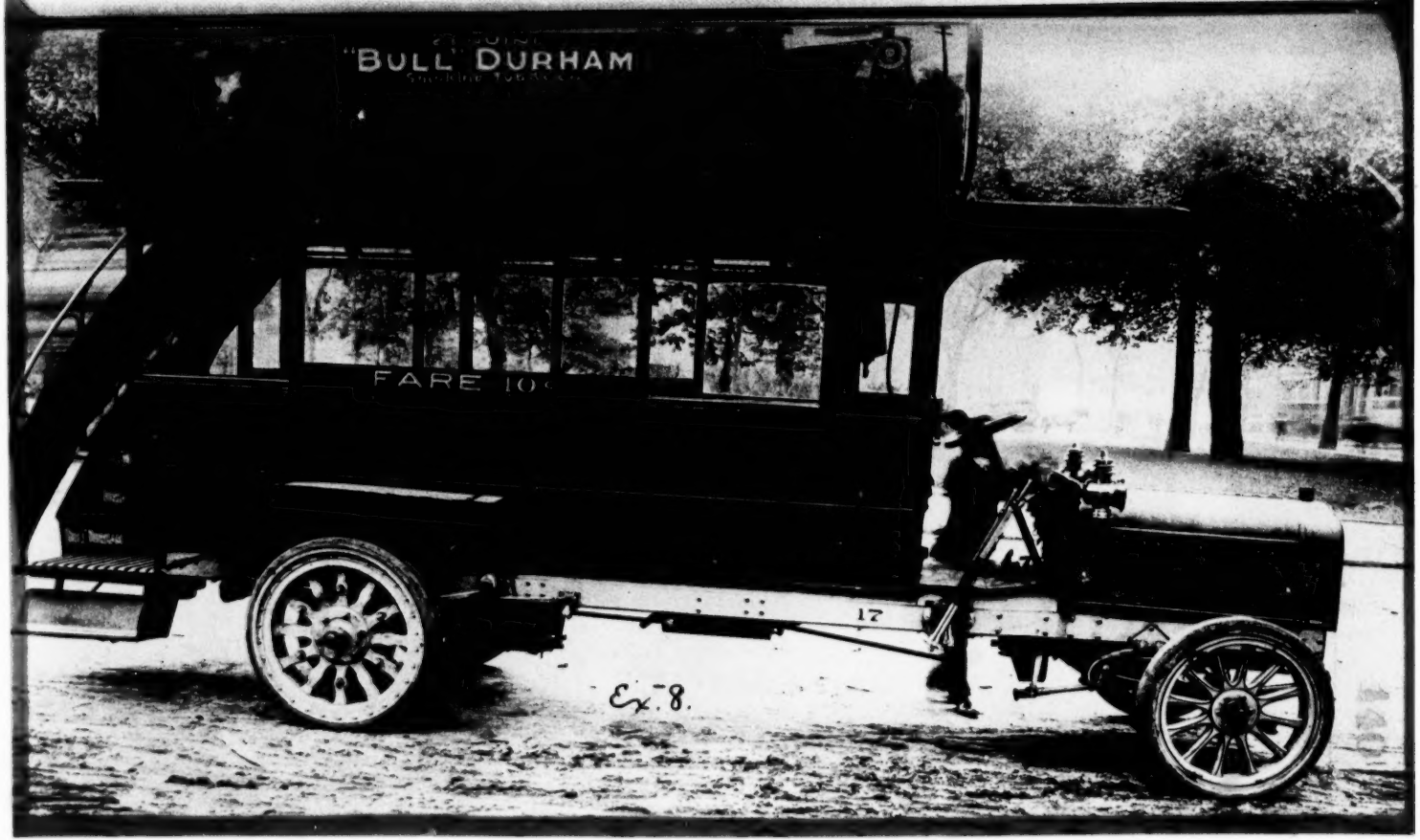
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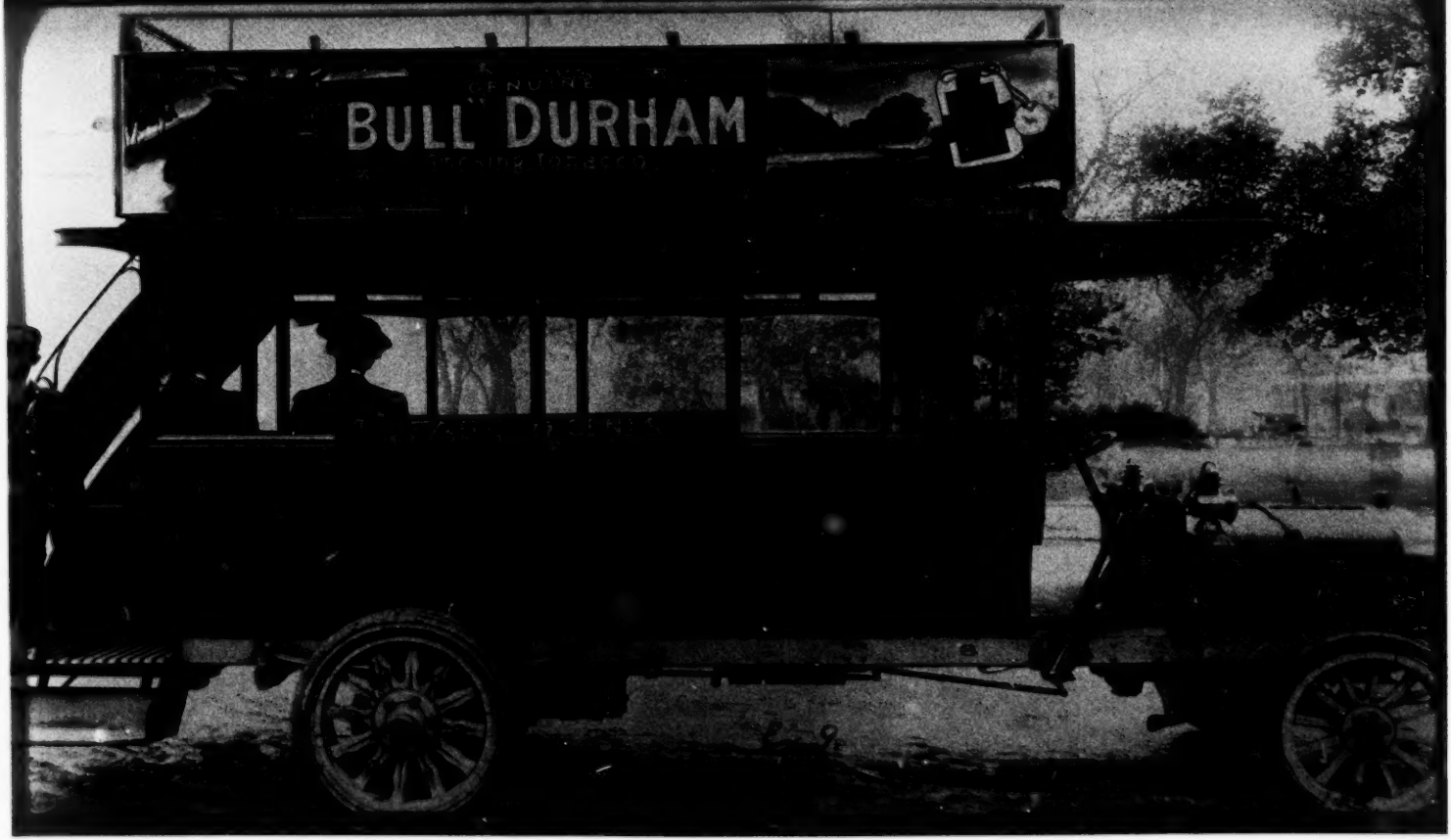
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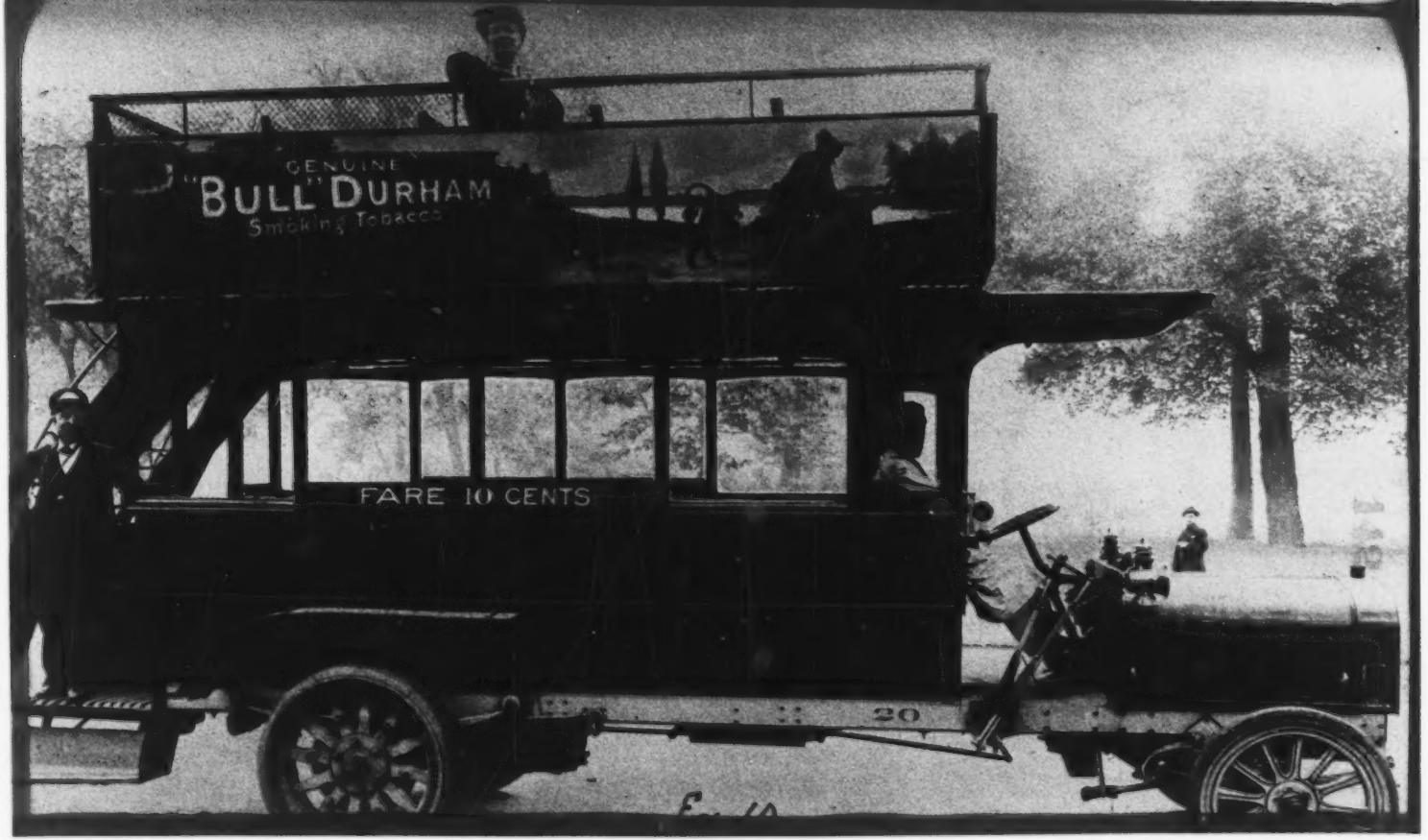
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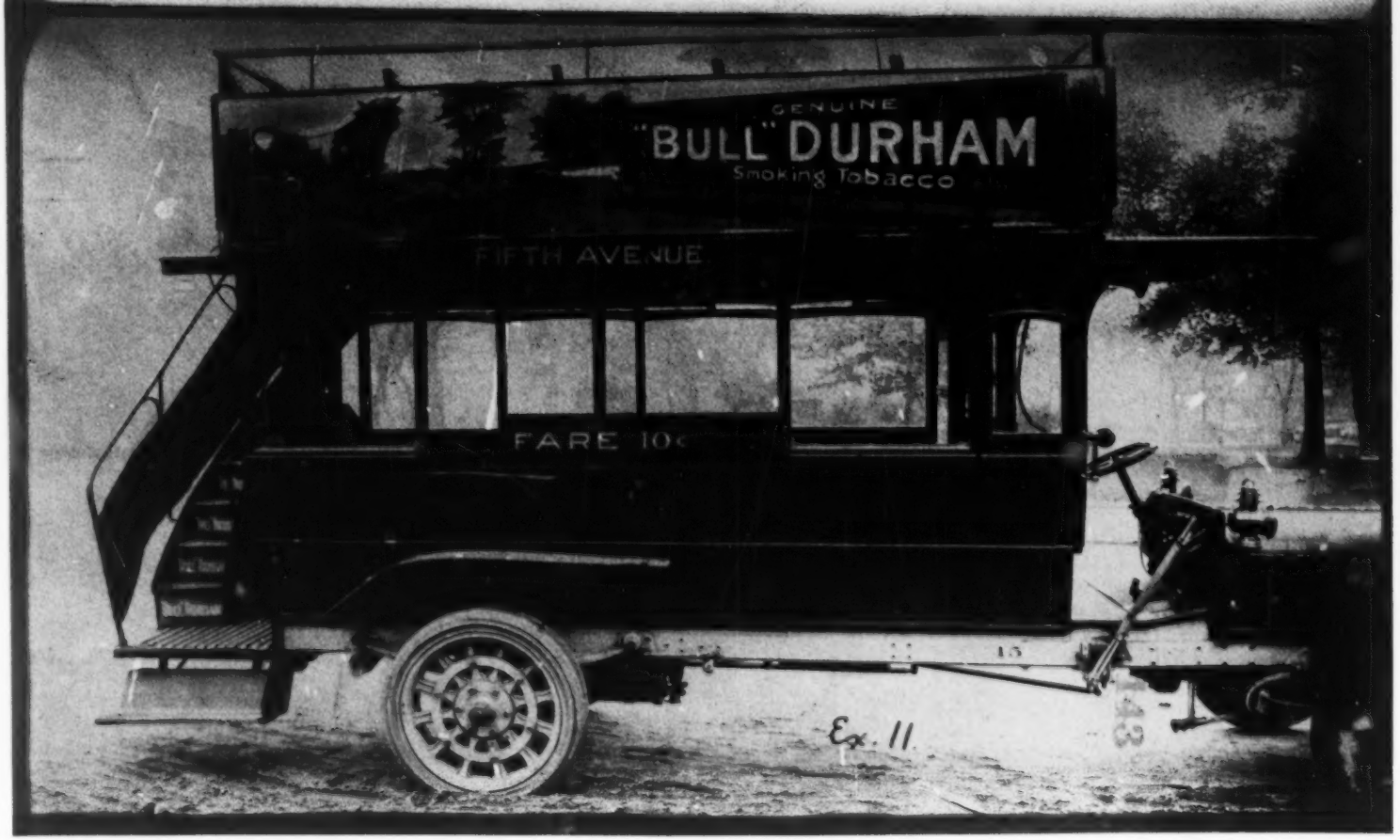
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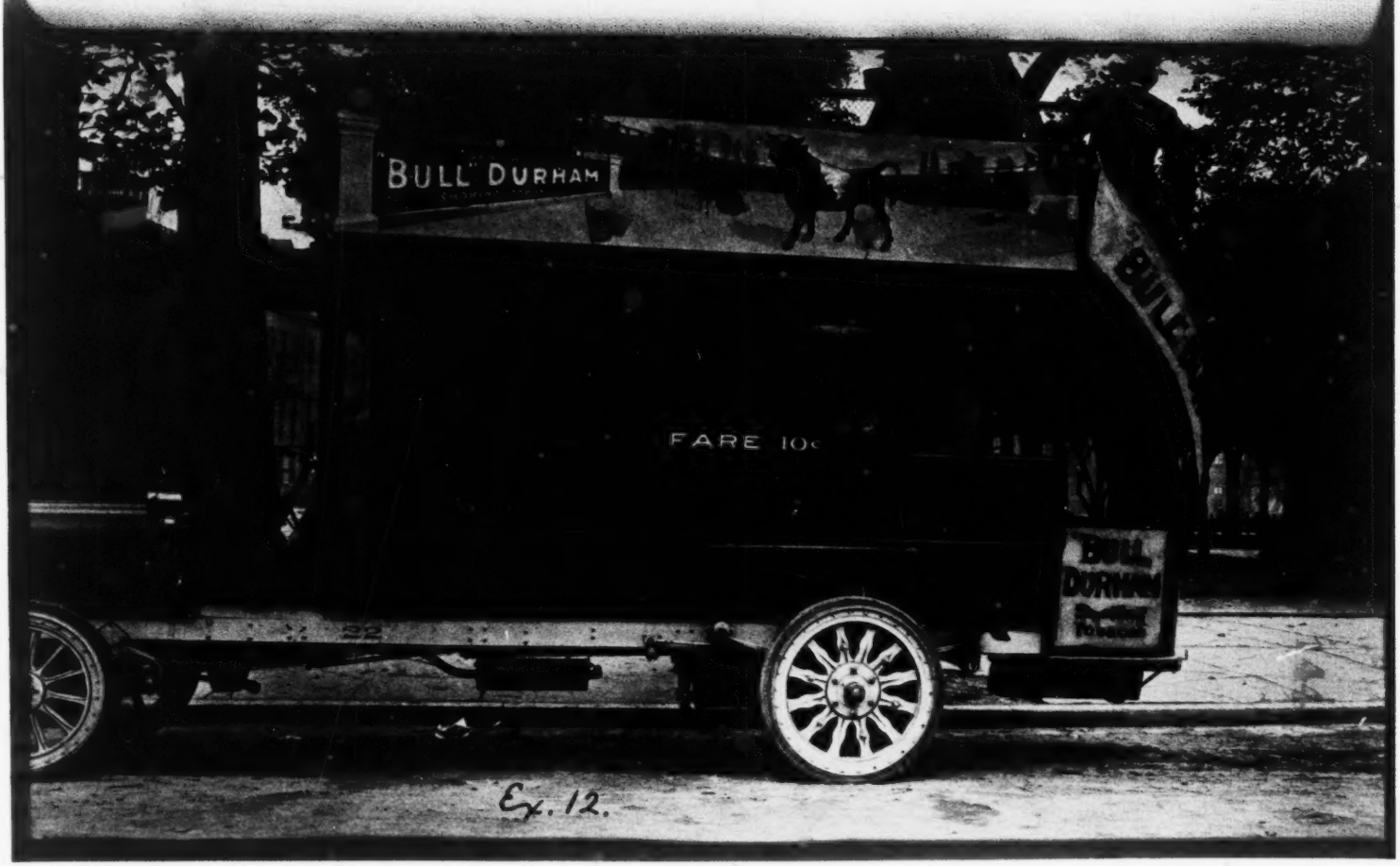

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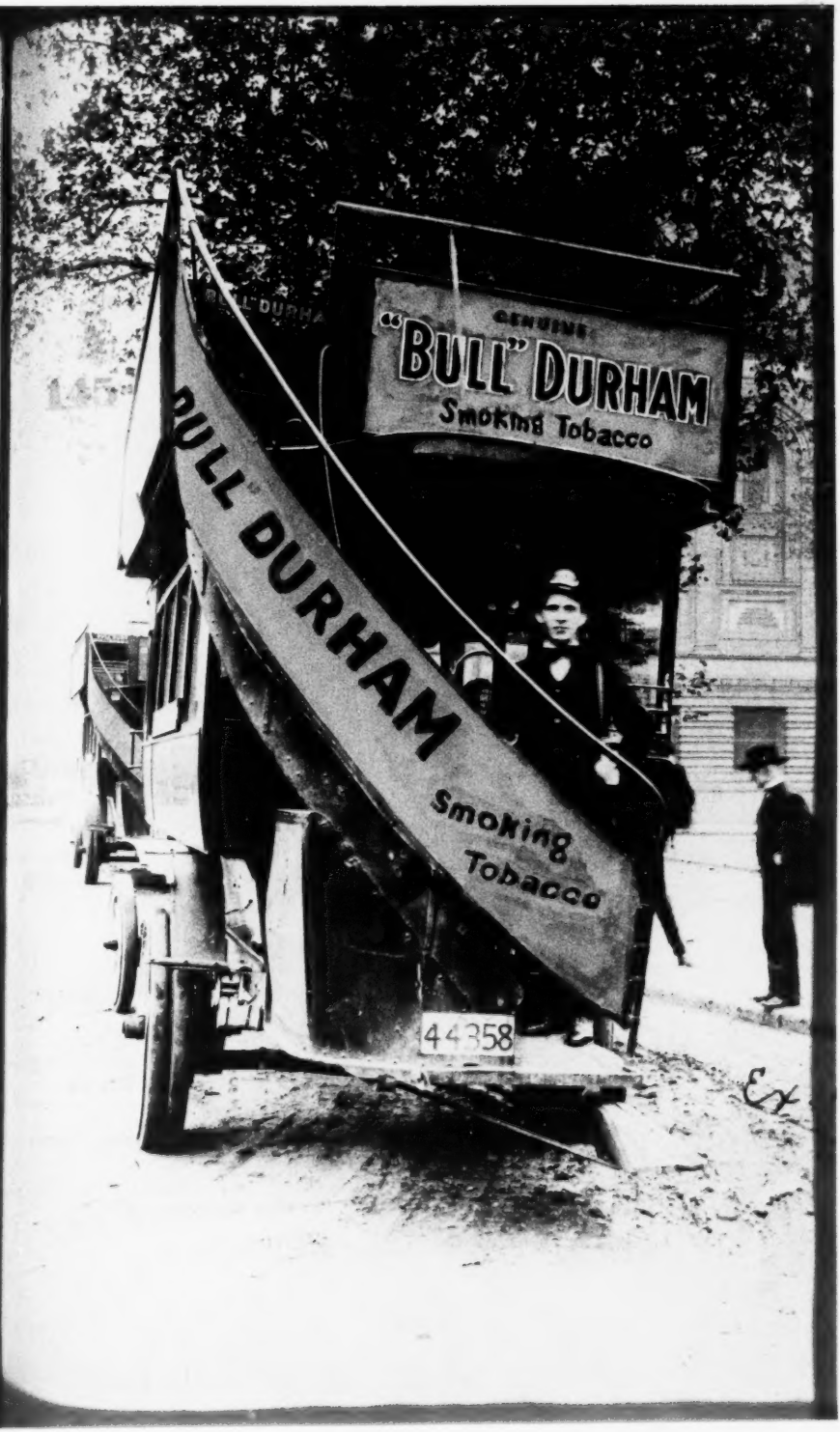
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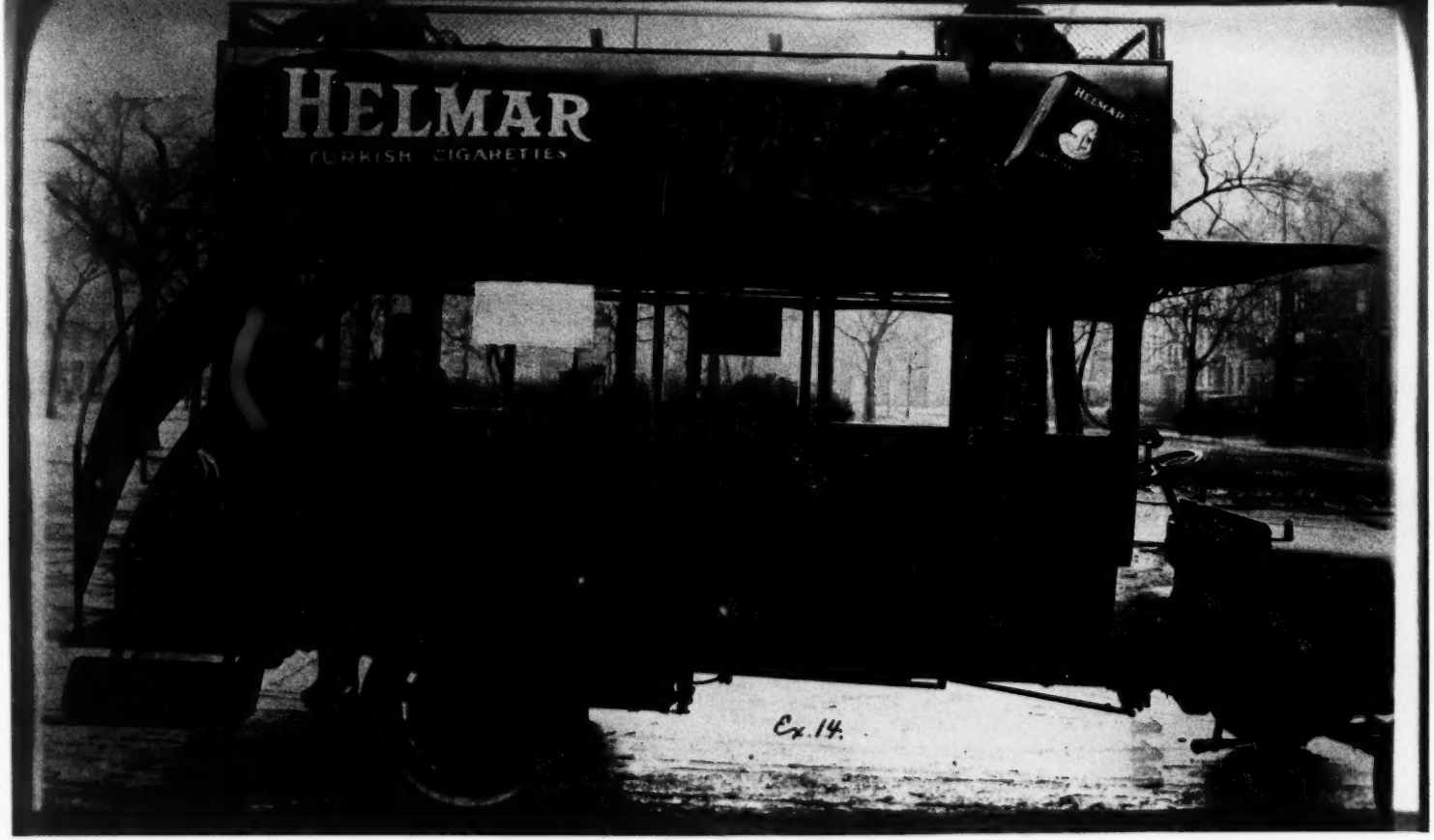
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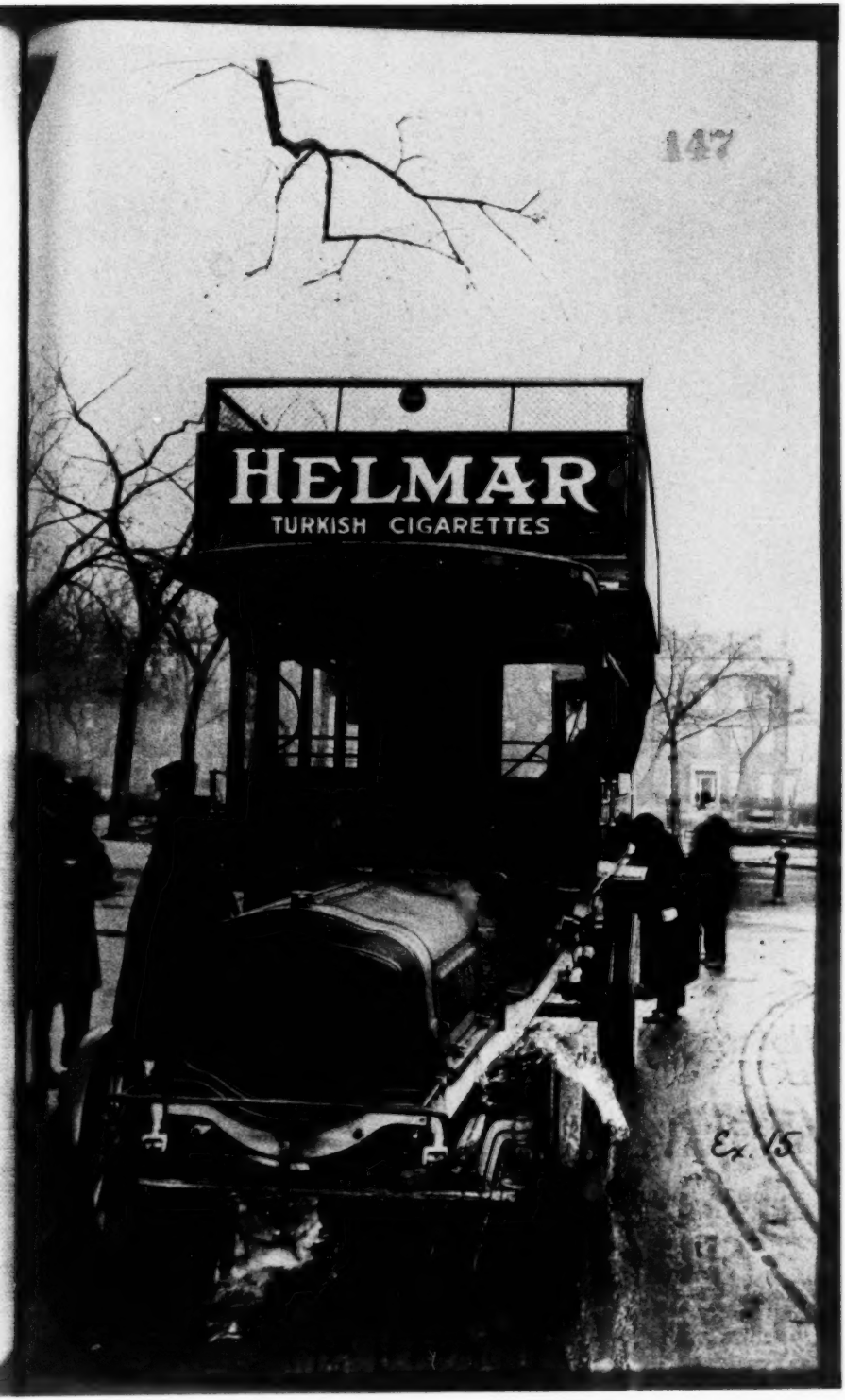
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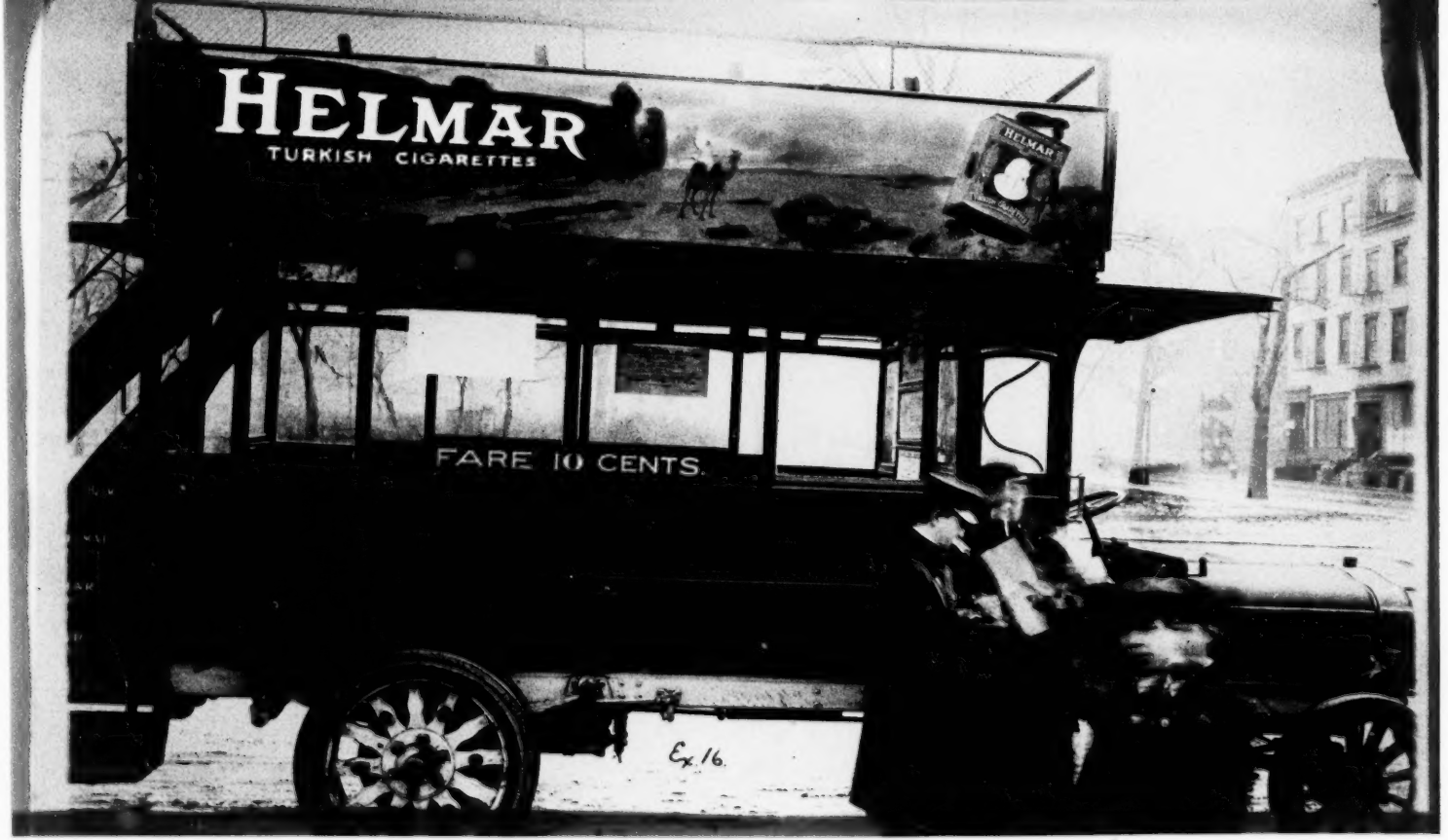
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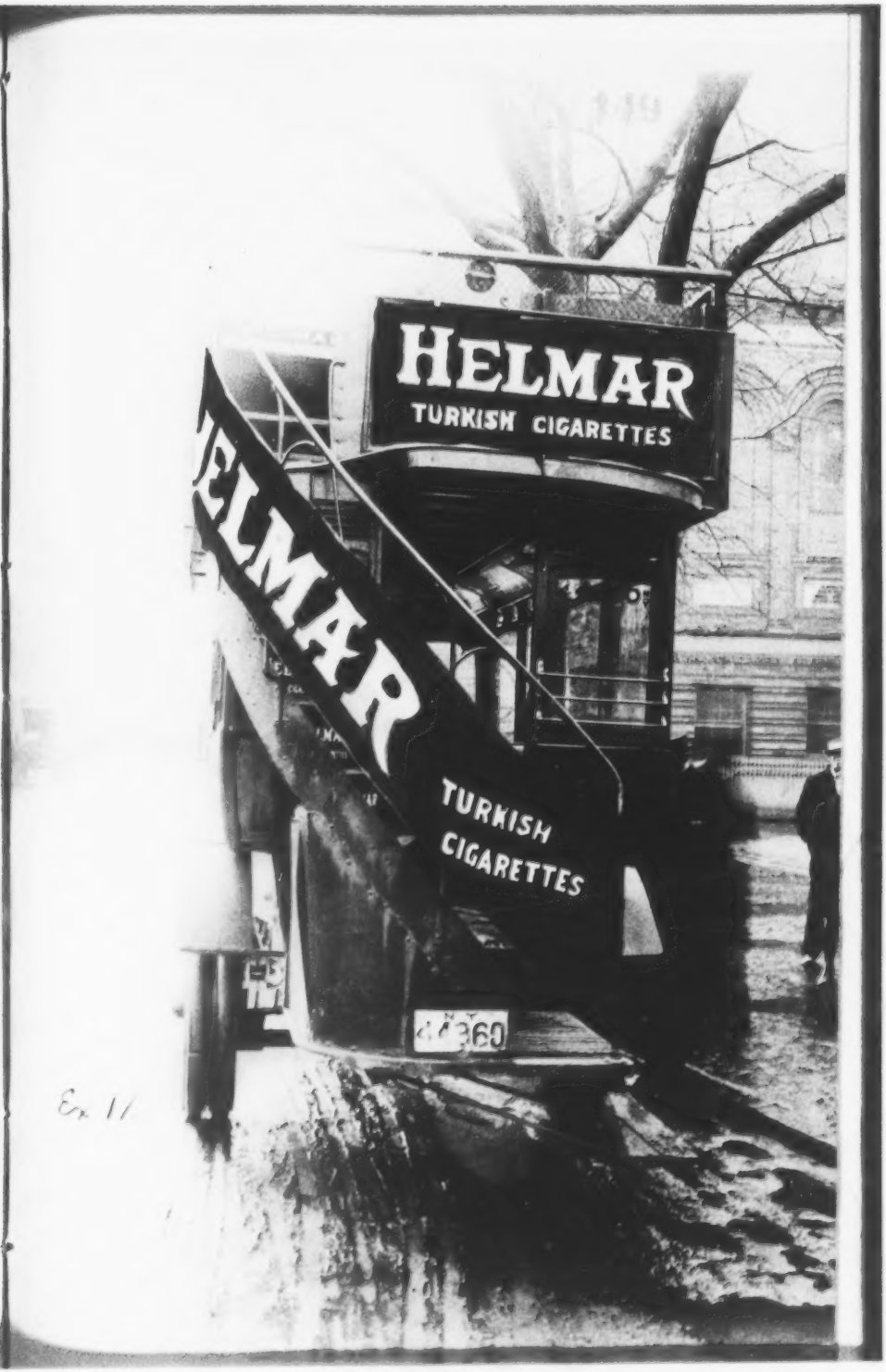

Ex. 11

268 Supreme Court, Appellate Division, First Department.

FIFTH AVENUE COACH COMPANY, Plaintiff-Appellant,
against
THE CITY OF NEW YORK, Defendant-Respondent.

Notice of Appeal.

SIRS: Please take notice that Fifth Avenue Coach Company above named hereby appeals to the Court of Appeals of the State of New York from an order of the Appellate Division of the Supreme Court, First Department, made and entered herein on or about June 5th, 1908, and from a judgment entered in this action in the office of the Clerk of the County of New York on or about June 11th, 1908, affirming a prior judgment in favor of the above named respondent and against the above named appellant entered herein on or about January 27th, 1908, and further adjudging that the above named defendant, The City of New York, recover from the above named plaintiff, Fifth Avenue Coach Company, the sum of Two hundred forty-two and 25/100 Dollars ($242.25), and from each and every part of said order and of said judgment.

Dated, New York, June 19, 1908.

Yours, etc.,

PAGE, CRAWFORD & TUSKA,
Attorneys for Plaintiff-Appellant.

Office & P. O. Address, 32 Liberty Street, Borough of Manhattan, City of New York.

269 To Hon. Francis K. Pendleton, Corporation Counsel, Attorney for Respondent, Hall of Records, Borough of Manhattan, City of New York.

Hon. Peter J. Dooling, Clerk of the County of New York.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 5th day of June, 1908.

Present:

Hon. George L. Ingraham,
" Chester B. McLaughlin,
" John Proctor Clarke,
" James W. Houghton,
" Francis M. Scott, Justices.

216 .

FIFTH AVENUE COACH COMPANY, Appellant,
vs.
THE CITY OF NEW YORK, Respondent.

Order of Affirmance on Appeal from Judgment Entered on Decision of the Court or on Report of Referee.

An appeal having been taken to this Court by the plaintiff from a judgment of the Supreme Court entered on the 27th day of
270 January, 1908, and the said appeal having been argued by Mr. William H. Page of counsel for the appellant, and by Mr. Terence Farley of counsel for the respondent, and due deliberation having been had thereon, it is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed, and that the respondent recover of the appellant the costs of this appeal.

Enter,

G. L. I.

Supreme Court, County of New York.

FIFTH AVENUE COACH COMPANY, Plaintiff-Appellant,
against
THE CITY OF NEW YORK, Defendant-Respondent.

Judgment of Affirmance.

The plaintiff in the above-entitled action having appealed to the Appellate Division of the New York Supreme Court in and for the First Department, from the judgment herein entered and filed in the office of the Clerk of the County of New York on or about the 27th day of January, 1908, in favor of the defendant and against the plaintiff, dismissing the complaint herein upon the merits,
271 and for the sum of $74.50 costs, and the said appeal having been duly argued at the said Appellate Division, and an order having been duly entered in the office of the Clerk of said Appellate Division on or about the 5th day of June, 1908, unanimously affirming in all things the said judgment so appealed from as aforesaid with costs of this appeal to the defendant-respondent, and the costs of the defendant-respondent having been duly taxed at the sum of $242.25,

Now on motion of Francis K. Pendleton, Corporation Counsel, it is

Unanimously adjudged that the said judgment so appealed from as aforesaid be, and the same hereby is in all things affirmed; and it is further

Adjudged that the above-named defendant, The City of New York, recover of the above-named plaintiff, Fifth Avenue Coach Company,

the sum of $242.25, the amount of its costs as taxed, and that it have execution therefor.

Dated, New York, June 11th, 1908.

PETER J. DOOLING, *Clerk.*

272 Supreme Court, Appellate Division, First Department, May, 1908.

George L. Ingraham,
Chester B. McLaughlin,
John Proctor Clarke,
James W. Houghton,
Francis M. Scott, JJ.

No. 2166.

FIFTH AVENUE COACH COMPANY, Appellant,
vs.
THE CITY OF NEW YORK, Respondent.

Opinions.

Appeal from a judgment dismissing complaint entered upon decision after trial at Special Term.

Mr. William H. Page, for appellant.
Mr. Terence Farley, for respondent.

MCLAUGHLIN, *J.:*

The plaintiff runs a stage line on Fifth Avenue in the City of New York and brought this action to recover a judgment perpetually enjoining and restraining the defendant from interfering in any way with its displaying signs or advertisements on the exterior of its coaches,—it alleging in the complaint that the defendant had threatened and intended to interfere with it in this respect.

273 Defendant by its answer, denied that it had made the threats and then, as an affirmative defense, alleged that the displaying of such signs or advertisements was in violation of an ordinance of the City, which was set forth.

The Court found that the displaying of such signs or advertisements was in violation of the ordinance; that the same was not a necessary incident of plaintiff's business; and was an *ultra vires* act, for which reason it refused to grant the injunction and dismissed the complaint on the merits.

The complaint was properly dismissed and the judgment would be affirmed without opinion were it not for the fact that we do not concur in the reasons assigned by the learned Justice at Special Term for making this disposition of the case. From the facts proved, and the findings made, a case is not presented to a court of equity which calls for the exercise of its powers. This Court held in *Eden Musee Am. Co., Ltd., vs. Bingham, as Police Commr.* (decided at the April Term, not yet reported) that a court of equity would not exercise its

jurisdiction to prevent a police officer from arresting a person for the performance of an act which was not a crime. Much less, then, will it, by injunction, interfere to prevent a person or municipal corporation from doing an alleged illegal act, especially when it is apparent that such act, if committed, will not do the party complaining an irreparable injury, or such as may not be compensated in an action at law. A court of equity has great power, but it has only recently been supposed that such power would be exercised in every case, at the mere suggestion of a party to prevent a real or imaginary wrong.

274 If any person, by the use of force, destroys the plaintiff's coaches, or interferes with the signs or advertisements on their exterior, then if the plaintiff is legally entitled to display such signs or advertisements, such person can be arrested and punished under the criminal laws of the State and an action can also be maintained against the party committing such acts to recover the damages sustained.

The plaintiff under its charter, has a right to operate its stage line along the avenue in question, and whether or not it can, as an incident to that right, display signs or advertisements on the exterior of its coaches, must be determined when the question actually arises and not, as here, upon a supposed case which has for its foundation a mere threat which may never be carried into effect. The plaintiff is incorporated under the statutes of the State, and if it be true, as asserted, that it is exceeding its corporate powers, this would seem to be a concern of the State and not of the City, and it is difficult to imagine how the City can be legally justified in interfering upon this ground. The City undoubtedly, by ordinance, can regulate the traffic upon its streets, but it may not be out of place to suggest that the display of the signs or advertisements in question does not violate the ordinance set out in the defendant's answer and proved upon the trial. That ordinance reads as follows:

"No advertising trucks, vans or wagons shall be allowed in the streets of the Borough of Manhattan under a penalty of ten dollars for each offense. Nothing herein contained shall prevent the putting of business notices upon ordinary business wagons so long as

275 such wagons are engaged in the usual business or work of the owner and not used merely or mainly for advertising."

The plaintiff's vehicles are engaged in its usual business, which is the transportation of passengers, and the same are not used "merely" or "mainly" for advertising.

The judgment appealed from is, therefore, affirmed with costs.

Ingraham, J., concurs.

Scott, J.:

I concur in the affirmance of this judgment on the grounds stated by Mr. Justice McLaughlin; and upon the further ground that the plaintiff has no right or authority to use its stages for the purposes of advertising any other business than that which it conducts itself.

Clarke and Houghton, JJ., concur with Scott, J.

Waiver of Certification.

It is hereby stipulated that the foregoing are true and correct copies of the Notice of Appeal to the Court of Appeals, Order of Affirmance of Appellate Division, Judgment of Affirmance, Opinions of Mr. Justice McLaughlin and Mr. Justice Scott of the Appellate Division, First Department, and all the papers, all the evidence taken and proceedings had upon the trial herein, all exhibits and the entire record before the Appellate Division of the Supreme Court, First Department, upon which said judgment and order ap-
276 pealed from were founded, and certification of said papers and record in pursuance of Section 1353 of the Code of Civil Procedure or otherwise is hereby waived pursuant to Section 3301 of the Code of Civil Procedure.

Dated, New York, June 23, 1908.

PAGE, CRAWFORD & TUSKA,
Attorneys for Appellant.
FRANCIS K. PENDLETON,
Corporation Counsel, Attorney for Respondent.

277 At a Special Term, Part II of the Supreme Court, held in and for the County of New York, at the County Court House, in said County, on the 14th day of January, 1909.

Present: Hon. Vernon M. Davis, Justice.

FIFTH AVENUE COACH COMPANY, Plaintiff-Appellant,
against
THE CITY OF NEW YORK, Defendant-Respondent.

The plaintiff in the above entitled action having appealed to the Court of Appeals of the State of New York, from the order of the Appellate Division of the Supreme Court, First Department, made and entered herein on or about the 5th day of June, 1908, and from the judgment herein entered and filed in the office of the Clerk of the County of New York, on or about the 11th day of June, 1908, affirming the judgment in favor of the respondent and against the appellant entered herein on or about the 27th day of January, 1908, and further adjudging that the above named defendant, The City of New York, recover of the above named plaintiff, Fifth Avenue Coach Company, the sum of $242.25 costs, and the said appeal having been duly argued in the Court of Appeals, and after due de-
278 liberation the Court of Appeals having ordered and adjudged that the said order and judgment so appealed from as aforesaid, be in all things affirmed with costs of this appeal to the defendant-respondent; and having further ordered and adjudged that the proceedings herein be remitted to the Supreme Court there to be proceeded upon according to law.

Now upon reading and filing the said remittitur and on motion of Francis K. Pendleton, Corporation Counsel, it is

Ordered and adjudged, that the said order and judgment of the

Court of Appeals be and the same hereby are made the order and judgment of this court.

Enter,

V. M. D., *J. S. C.*

278½ [Endorsed:] New York Supreme Court. Fifth Avenue Coach Company, Plaintiff-Appellant, against The City of New York, Defendant-Respondent. (Copy.) Order on Remittitur and Notice of Entry. Francis K. Pendleton, Corporation Counsel, Hall of Records, Borough of Manhattan, New York City. To Page, Crawford & Tuska, Esqs., Attorneys for the Pl'ff.

Please take notice that an order, of which the within is a copy, was this day duly entered and filed in the office of the Clerk of the County of New York.

New York, Jan. 14th, 1909.

Yours, etc., FRANCIS K. PENDLETON,
Corporation Counsel, Hall of Records,
Borough of Manhattan, New York City.

To Page, Crawford & Tuska, Attorneys for the Pl'ff.

Rec'd January 15, 1909.

279 Supreme Court, County of New York.

FIFTH AVENUE COACH COMPANY, Plaintiff,
against
THE CITY OF NEW YORK, Defendant.

The plaintiff in the above entitled action having appealed to the Court of Appeals of the State of New York from the order of the Appellate Division of the Supreme Court, First Department made and entered herein on or about the 5th day of June 1908, and from the judgment herein entered and filed in the office of the Clerk of the County of New York on or about the 11th day of June, 1908, affirming a prior judgment in favor of the above named defendant-respondent and against the above named plaintiff-appellant herein entered and filed in the Office of the Clerk of the County of New York, on or about the 27th day of January, 1908, and further adjudging that the above named defendant The City of New York recover of the above named plaintiff, Fifth Avenue Coach Company, the sum of $242.25 and the said appeal having been duly
280 argued at the Court of Appeals and after due deliberation the Court of Appeals having ordered and adjudged that the said order and judgment so appealed from as aforesaid be in all things affirmed with costs of this appeal to the defendant-respondent, and an order having been duly entered in the Office of the Clerk of the County of New York, on or about the 14th day of January, 1909, making the order and judgment of the Court of Appeals the order and judgment of this Court, and the costs of the defendant having been duly taxed at the sum of $163.

Now on motion of Francis K. Pendleton, Corporation Counsel, it is

Adjudged that the said order and judgment so appealed from as aforesaid be and the same hereby are in all things affirmed, and it is further

Adjudged that the defendant, The City of New York recover of the plaintiff, Fifth Avenue Coach Company the sum of $163, the amount of said defendant's costs as taxed, and that the defendant have execution therefor.

Dated, New York, January 20th, 1909.

PETER J. DOOLING, *Clerk.*

M. J. D.

280½ [Endorsed:] New York Supreme Court, County of New York. Fifth Avenue Coach Company, Plaintiff, against The City of New York, Defendant. Copy of Judgment and Notice of Entry. Francis K. Pendleton, Corporation Counsel, Hall of Records, Borough of Manhattan, New York City. To Page, Crawford & Tuska, Attorneys for Plaintiff.

Please take notice that a judgment, of which the within is a copy, was this day duly entered and filed in the office of the Clerk of the County of New York.

New York, Jan. 20th, 1909.

FRANCIS K. PENDLETON,
Corporation Counsel, Hall of Records, Borough of Manhattan, the City of New York.

To Page, Crawford & Tusca, Attorneys for Plaintiff.

281 United States Supreme Court.

FIFTH AVENUE COACH COMPANY, Plaintiff in Error,
against
THE CITY OF NEW YORK, Defendant Below.

Notice.

Please take notice that the within is a copy of an undertaking duly approved by the Honorable R. W. Peckham, Associate Justice of the Supreme Court of the United States on February 2, 1909, and this day duly entered and filed in the within entitled action, in the office of the Clerk of the Supreme Court of the State of New York for the County of New York, in the Borough of Manhattan, City of New York.

Dated, New York, February 4, 1909.

Yours, etc.,

PAGE, CRAWFORD AND TUSKA,
Attorneys for Plaintiff in Error, 32 Liberty Street, Borough of Manhattan, City of New York.

To Hon. Francis K. Pendleton, Corporation Counsel, Att'y for Def't in Error, Hall of Records, Borough of Manhattan, City of New York.

282 Know all men by these presents:

That we, Fifth Avenue Coach Company, as Principal, and The United States Fidelity and Guaranty Company, *and The United States Fidelity and Guaranty Company,* a Corporation organized under the laws of the State of Maryland, having an office and usual place of business at No. 66 Liberty Street, in the City of New York, as Surety, are held and firmly bound unto The City of New York, a Municipal Corporation organized and existing under the laws of the State of New York, in the full and just sum of One Thousand Dollars ($1,000), lawful money of the United States of America, to be paid to the said City of New York, its attorneys, successors or assigns, to which payment well and truly to be made, the said Principal binds itself, its successors and assigns, and the said Surety Company binds itself, its successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 28th day of January, in the year of our Lord, one thousand nine hundred and nine.

Whereas, lately at a plea in the Court of Appeals of the State of New York, held at Albany, New York, on the sixth day of January, 1909 a suit pending in the Supreme Court of the State of New York, between the Principal above named as Plaintiff and the City of New York, Defendant, a judgment upon return from said Supreme Court was rendered against the said Principal above named and in favor of the City of New York, dismissing Plaintiff's complaint with costs, and the Principal above named having obtained a writ of error and filed a copy thereof in the Clerk's Office of

283 the said Supreme Court to reverse the judgment in the aforesaid suit, and a citation directed to said City of New York citing and admonishing it to be heard, and appear at the Supreme Court of the United States at Washington, D. C. thirty days from date thereof;

Now the condition of the above obligation is such, that if the said Fifth Avenue Coach Company shall prosecute said writ of error to effect and answer all costs, if it fail to make the said plea good, then the above obligation to be void, else to remain in full force and virtue.

FIFTH AVENUE COACH COMPANY,
By R. W. MEADE, *President.*
THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
[SEAL.] By SYLVESTER J. O'SULLIVAN, *Manager.*
Attest: GEORGE E. HAYES, *Attorney-in-fact.*

Signed, sealed and delivered, this 28th day of January, 1909, in the presence of

[SEAL.] ARTHUR J. RONAGHAN.

284 *Affidavit, Acknowledgment, and Justification by The United States Fidelity and Guaranty Company.*

We Will Bond You. Fidelity, Judicial, Burglary, Contract.

STATE OF NEW YORK,
County of New York, ss:

Before me personally came Sylvester J. O'Sullivan, known to me to be the Manager of The United States Fidelity and Guaranty Company, the corporation described in and which executed the annexed bond of Fifth Ave. Coach Co. as surety thereon, who being by me duly sworn, deposes and says that he resides in the City of New York, State of New York, and that he is the Manager of said The United States Fidelity and Guaranty Company, and knows the corporate seal thereof; that said Company is duly and legally incorporated under the laws of the State of Maryland; that said Company has complied with the provisions of the Act of Congress of August 13, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond of Fifth Ave. Coach Co. is the corporate seal of said The United States Fidelity and Guaranty Company, and was thereto affixed by order and authority of the Board of Directors of said Company; and that he signed his name thereto by like order and authority as Manager of said Company; and that he is acquainted with George E. Hayes, and knows him to be Attorney-in-fact of said Company; and that the signature of said George E. Hayes, subscribed to said bond is the genuine handwriting of said George E. Hayes, and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unencumbered and liable to execution, exceeds its claims, debts and liabilities, of every nature whatsoever, by more than the sum of two million dollars ($2,000,000.00).

[SEAL.] SYLVESTER J. O'SULLIVAN.

Sworn to, acknowledged before me, and subscribed in my presence this 28th day of Jan. 1909.

DANIEL C. DEASY, [SEAL.]
Notary Public, New York County.

M. J. D.

285 [Endorsed:] United States Supreme Court. Fifth Avenue Coach Company, Plaintiff in Error, against The City of New York, Defendant in Error. Undertaking. Page, Crawford and Tuska, Attorneys for Plaintiff in Error, 32 Liberty Street, Borough of Manhattan, City of New York. The within Bond is hereby approved this 2d day of February, 1909. R. W. Peckham, Associate Justice of the Supreme Court of the United States.

Service of a copy of the within undertaking is hereby admitted. Dated February 4, 1909.

———, ———,
Corporation Counsel, Att'y for Def't in Error.

286 In the Supreme Court of the United States.

FIFTH AVENUE COACH COMPANY, Plaintiff in Error,
against
THE CITY OF NEW YORK, Defendant Below.

Petition for Writ of Error.

To the Supreme Court of the United States:

The petition of the Fifth Avenue Coach Company, the plaintiff in error, by Page, Crawford & Tuska, its attorneys, respectfully shows:

First. The plaintiff in error was, and still is, a corporation, duly formed and organized under the Laws of the State of New York and engaged in the operation of automobile stages upon routes extending along Fifth Avenue and other Streets in the Borough of Manhattan, City of New York, under and in pursuance of various Acts of the legislature of New York, including Ch. 536, L. 1886, Ch. 182, L. 1889, Ch. 657, L. 1900, and Ch. 466, L. 1901. By proceedings duly had under said various Acts plaintiff has acquired all the property rights, franchises and powers of the Fifth Avenue Transportation Company, Limited, mentioned in said Acts of 1886 and 1889. By proceedings had under said Act of 1901 the plaintiff has duly extended and now operates its routes.

Second. Defendant in error, the City of New York, is a municipal corporation, organized and existing under and by virtue of
287 Ch. 466, L. 1901, and the Acts amendatory thereof and exercising its powers through the medium of various departments, which among others, includes the Mayor, Department of Police, President of the Borough of Manhattan, Department of Highways and Bureau of Incumbrances, the powers and functions of which are specified in said chapter.

Third. The plaintiff in error has operated stages upon its routes and has made use of the interior of said stages for the display of advertising signs or matter for many years.

Fourth. In or about the month of May, 1905, the plaintiff in error began utilizing the exterior portions of its stages for advertising purposes, and with the complete substitution of automobile stages for horse stages upon its routes, which was effected during the month of July, 1907, began to utilize the exterior of its said stages more extensively for said purposes, which it was able to do by reason of the necessary difference in the form of the new vehicles and in the consequent increase of space adapted for use in the display of advertising matter.

Fifth. The use of said space on said vehicles for advertising purposes as aforesaid enables the plaintiff to secure a substantial income from portions of its property required in the construction of its stages for transportation purposes, but not susceptible of being used otherwise for the purposes of its business.

Sixth. Prior to August 30, 1907, defendant in error, through various officials and officers, interfered with and threatens to con-

tinue to so interfere with and prevent the use of signs on the exterior space upon the stages operated by the plaintiff in error herein for the display of advertising matter, and to cause the removal of said advertising matter.

288 Seventh. On or about the 30th day of August, 1907, the plaintiff in error commenced an action against said defendant in error in the Supreme Court of the State of New York, praying for an injunction permanently enjoining and restraining the defendant in error, its officials, departments, bureaus, and its or their agents, employees and attorneys, and all persons authorized to act for said defendant in error, or claiming to act for or under it, and from interfering in any way with the property of the plaintiff in error, that is, with the advertising signs or matter, permitted, placed or used by the plaintiff or under its direction, upon the exterior of its stages, or any of them, operated upon its routes in the Borough of Manhattan, City of New York, or from molesting or in any way interfering with said stages, or the operation thereof, and for such other, further or different relief as was proper.

Eighth. On October 14, 1907, said defendant in error appeared in said action and interposed an answer as a defense thereto, setting up in justification of said interference with the exterior advertising signs or matter appearing on the stages of the plaintiff in error, that the same constituted a nuisance and violated an ordinance of the City of New York, adopted by the Board of Aldermen on the 30th day of October, 1906, and approved by the Mayor thereof on the 8th day of November, 1906, as contained in the Code of Ordinances of the said City, Sec. 41, Ch. 2 of Art. 4 of Part II thereof, as follows:

"SEC. 41. No advertising trucks, vans or wagons shall be allowed in the streets of the Borough of Manhattan under a penalty of $10 for each offense. Nothing herein contained shall prevent the putting of business notices upon ordinary business wagons, so long as such wagons are engaged in the usual business or regular work of the owner, and not used merely or mainly for advertising."

289 Said defendant in error also alleged in its answer that said ordinance, or ordinances substantially similar, have been in existence in the City of New York since June 19, 1882.

Under the practice in said New York Supreme Court, no further pleading or reply to said defense was required.

Ninth. The issues in said action came to trial in said Supreme Court on December 17th and 18th, 1907, before Honorable David Leventritt, Justice, and on January 27, 1908, the decision of the trial court was rendered, dismissing the said complaint, with costs, and directing judgment in favor of the defendant in error. Accordingly, on January 27, 1908, judgment was entered in the office of the Clerk of the County of New York, dismissing the complaint of the plaintiff in error, upon the merits, and directing judgment for $74.57, costs, against plaintiff in error.

Tenth. On January 30, 1908, an appeal was taken from said judgment to the Appellate Division of the Supreme Court, for the First

Department, and said judgment was affirmed with costs on June 5, 1908, and judgment of affirmance was entered on June 11, 1908.

Eleventh. From said judgment of affirmance, on June 19, 1908, said plaintiff in error appealed to the Court of Appeals, the same being the highest court in the State of New York in which a decision in said suit could be had, and on January 5, 1909, the said Court of Appeals rendered a decision, directing that said judgment dismissing the said complaint be affirmed with costs.

Twelfth. On January 6, 1909, the said Court of Appeals made a final judgment and decree in said suit, directing that said judgment of the Appellate Division be affirmed, and that said complaint be dismissed with costs, and that the record be removed to the
290 Supreme Court of the State of New York, to be enforced according to law. Said record was thereupon removed accordingly, and was filed in the office of the Clerk of the Supreme Court in and for the County of New York on the 14th day of January, 1909, whereupon the said Supreme Court, in obedience to the judgment of the Court of Appeals and in accordance with the laws and practice in the State of New York, gave final judgment in said suit or action, adjudging that the judgment of the Court of Appeals be made the judgment of the Supreme Court, and that the complaint in said suit or action be dismissed with costs.

Thirteenth. In said Court of Appeals there was drawn in question the validity of the ordinance of the City of New York and the authority exercised thereunder by defendant in error, against the plaintiff in error, on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of its validity. In said Court of Appeals it was claimed by the plaintiff in error that said ordinance and the authority exercised thereunder by the defendant in error was a taking of its private property without due process of law and therein offended against the provisions of the Fourteenth Amendment of the Constitution of the United States, and that said ordinance and the authority exercised thereunder contravened Section 10 of Article I of the Constitution of the United States, which forbids the impairment of contracts as contained in the Acts of the legislature hereinbefore referred to, pursuant to which plaintiff in error operates its stages upon and along routes therein described in the city of New York. And further that said ordinance and the authority exercised thereunder denied to the plaintiff in error the equal protection of the laws guaranteed to it by the Constitution of the United States under Section 1 of the four-
291 teenth amendment thereof.

Fourth. Thereupon said Court of Appeals in said suit or action, in its decision therein, overruled the said claim of your petitioner and decided in favor of the validity of said ordinance and the authority exercised thereunder, to the prejudice of your petitioner, all of which will in more detail appear from the record and assignment of errors herein.

Wherefore, your petitioner prays for a writ of error directed to the Supreme Court of the State of New York, commanding that Court to send a record of the proceedings in said suit or action afore-

said and all things concerning the same, duly authenticated, to the justices of the Supreme Court of the United States and for the usual citation, to the end that the record of the proceedings being inspected, the said Justices of the Supreme Court of the United States may cause further to be done therein, to correct all error, what of right and according to the law and constitution of the United States, ought to be done.

And your petitioner will ever pray.

Dated, February 1, 1909.

[Seal Fifth Avenue Coach Company, New York. Incorporated 1896.]

FIFTH AVENUE COACH COMPANY,
By R. W. MEADE, *President.*
PAGE, CRAWFORD & TUSKA,
Attorneys for Plaintiff in Error, 32 Liberty Street, Borough of Manhattan, City of New York.

292 STATE OF NEW YORK,
County of New York, ss:

Richard W. Meade, being duly sworn, deposes and says: that he is President and an officer of the Fifth Avenue Coach Company, the corporation-plaintiff in error in the above entitled action; that the foregoing petition is true to the knowledge of this deponent, except as to the matters therein stated to be alleged on information and belief, and as to those matters, he believes it to be true; that the reason why this verification is not made by the plaintiff in error is because it is a corporation, and the grounds of deponent's belief as to all matters in said petition not stated upon his knowledge, are investigations which deponent has caused to be made concerning the subject matter of this petition, and information acquired by the deponent in the course of his duties as such officer of the corporation-plaintiff in error in this action.

RICHARD W. MEADE.

Sworn to before me this 1st day of February, 1909.

[Seal of Irving Reed, Notary Public, New York County.]

IRVING REED,
Notary Public, New York County.

The writ of error, as prayed for in the foregoing petition, is hereby allowed; and the bond is fixed at the sum of one thousand dollars ($1000).

Dated, February 2d, 1909.

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

293 [Endorsed:] United States Supreme Court. Fifth Avenue Coach Company, Plaintiff in Error, against The City of New York, Defendant in Error. Petition for Writ of Error. Page, Crawford & Tuska, Attorneys for Plaintiff in Error, 32 Liberty Street, Borough of Manhattan, City of New York.

294 In the Supreme Court of the United States.

FIFTH AVENUE COACH COMPANY, Plaintiff in Error,
against
THE CITY OF NEW YORK, Defendant Below.

Assignment of Errors.

Afterwards, to wit: on the 2d day of February, in the year of our Lord, one thousand nine hundred and nine, in this same term before the Justices of the Supreme Court of the United States at the Capitol in the City of Washington, came the Fifth Avenue Coach Company, plaintiff in error and plaintiff below, by its attorneys, Page, Crawford & Tuska, and says:

That in the record and proceedings decision and final judgment of the Court of Appeals of the State of New York, and of the Supreme Court of the State of New York aforesaid in the said suit or action there is manifest error in this, to wit:

(1) That by the record aforesaid it appears that the aforesaid judgment was given by the Court of Appeals of the State of New York against the plaintiff below and plaintiff in error in favor of the defendant below and defendant in error, whereas by the law of the land the said judgment should have been given for the plaintiff and against the defendant.

(2) That the said Court of Appeals of the State of New York erred in holding and deciding that the complaint of the plaintiff in said suit or action should be dismissed.

(3) That the Court of Appeals of the State of New York
295 erred in holding and deciding that the ordinance passed by the Board of Aldermen of the City of New York on the 30th day of October, 1906, and approved by the Mayor on the 8th day of November, 1906, being Section 41 of Chapter 2, of Article IV of Part Two of the Code of Ordinances of said city providing as follows:

"SECTION 41. No advertising trucks, vans or wagons shall be allowed in the streets of the Borough of Manhattan under a penalty of Ten Dollars for each offense. Nothing herein contained shall prevent the putting of business notices upon ordinary business wagons, so long as such wagons are engaged in the usual business or regular work of the owner, and not used merely or mainly for advertising,"

was a valid exercise of the legislative authority granted to said Board of Aldermen and said Mayor by the Legislature of the State of New York; and that the City of New York, the defendant in error, has the right, by virtue of said ordinance, to interfere with the display of advertising signs on the exterior of plaintiff's stages and to cause the removal thereof; and that such ordinance and such interference were a proper exercise of the authority vested in the said City to regulate the business conducted in the streets thereof, and that the plaintiff in error had no remedy against the defendant for the taking

of its private property by said interference with said advertisements, thereby holding and deciding that said plaintiff might be deprived of its property aforesaid without due process of law, in violation of the Constitution of the United States, and especially of Section 1, Article XIV of the amendments thereto.

(4) Upon the argument of this cause before the Court of Appeals of the State of New York, the plaintiff in error contended that, being the owner of certain stages lawfully engaged in carrying passengers for hire in certain streets in the City of New York, it had the right, as a right of property incidental to its ownership
296 of such stages, to display advertisements on the exterior thereof, and to receive remuneration therefor, of which right it could not be deprived without due process of law; that said Court of Appeals erred in holding and deciding that such display of advertisements on said stages was unlawful, because forbidden by the ordinance of the City of New York hereinbefore referred to, and also in holding and deciding that the Board of Aldermen and Mayor of said City had power and authority to enact said ordinance, and by enacting it to forbid and make unlawful the display of advertisements on said stages, said decisions being in contravention of Section I of the Fourteenth Amendment to the Constitution of the United States, which declares that no State shall deprive any person of property without due process of law.

(5) That the said Court of Appeals of the State of New York erred in holding that the application to plaintiff in error of said ordinance of the City of New York, does not violate the provisions of the 14th amendment of the Constitution of the United States, providing that a person shall not be deprived of property by the State without due process of law, and further in holding that the display of advertisements on the exterior of plaintiff's said vehicles is not a property right appurtenant to the ownership of private property, and the court erred further in sustaining the validity of said ordinance as applied to plaintiff in error, the effect of all of which has been to deprive the said plaintiff below, your petitioner, the plaintiff in error, of its property without due process of law in violation of the provisions of the Constitution of the United States aforesaid.

(6) That said Court of Appeals erred in holding and deciding in favor of the validity of the authority exercised by the City of New York, the defendant in error, namely, the authority to deprive
297 said plaintiff in error of its property right to display advertisements on the exterior of its vehicles as appurtenant to the ownership of personal property without compensation to it and without due process of law, which said deprivation violates Section 1, Article XIV of the amendments of the Constitution of the United States.

(7) That the said Court of Appeals of the State of New York erred in holding and deciding that the said ordinance of the City of New York hereinbefore referred to, and the application thereof to plaintiff in error do not contravene Section 10 of Article I of the Constitution of the United States, forbidding the impairment of the obligation of contracts, whereas in fact and in law the said ordinance, and its said application to plaintiff in error, do violate the provisions

of said Section by impairing the obligation of the following contracts, viz:

(*a*) The contract between the State of New York and the Fifth Avenue Transportation Company, Limited, to whose property, rights and privileges, and franchises as set forth in the Certificate of Incorporation of said Fifth Avenue Transportation Company, Limited, filed and recorded on the 28th day of November, 1885, in the office of the Secretary of State of New York and in the office of the Clerk of the County of New York, your petitioner, plaintiff in error, duly succeeded.

(*b*) The contracts set forth and contained in the statutes of the State of New York, namely, the Act of the Legislature of the State of New York, known as Chapter 536, of the Laws of 1886, entitled: "An act to authorize the Fifth Avenue Transportation Company (Limited) or its assigns, to run stages on Fifth Avenue through Washington Park and through South Fifth Avenue to the Bleecker Street Elevated Railway Station in the City of New York and return, passed June 2, 1886;"

298 And the Act of the Legislature of the State of New York, known as Chapter 182 of the Laws of 1889, entitled: "An Act to authorize the Fifth Avenue Transportation Company, (Limited), or its assigns, to run stages from the Bleecker Street Elevated Railway Station on South Fifth Avenue in the City of New York, through South Fifth Avenue, Canal and West Streets to the Desbrosses Street ferry and return, and also from Fifth Avenue through Thirteenth Street, University Place and Ninth Street to Broadway and return," to all of which contracts, rights, privileges and franchises, plaintiff in error has duly succeeded.

(*c*) The contract between the plaintiff in error and the State of New York, as set forth and contained in the Certificate of Incorporation of the Fifth Avenue Coach Company, filed and recorded in the office of the Secretary of State of the State of New York on the 25th day of July, 1896, and in the office of the Clerk of the County of New York on the 27th day of July, 1896.

(*d*) The contract set forth and contained in the certificate of approval of extension of routes of the Fifth Avenue Coach Company, your petitioner, plaintiff in error, by the Board of Railroad Commissioners of the State of New York, dated August 2, 1900, filed in the office of the Secretary of State of the State of New York on the 3d day of August, 1900, and in the office of the Clerk of the County of New York on the 4th day of August, 1900, and accepted by the Fifth Avenue Coach Company, your petitioner, plaintiff in error, by certificate dated August 4, 1900, filed in the office of the Secretary of State of the State of New York, and in the office of the Clerk of the County of New York on the 4th day of August, 1900, and the contract set forth and contained in the certificate of approval of extension of routes of the Fifth Avenue Coach Company, your petitioner, plaintiff in error, dated February 21, 1901, and filed in the office

299 of the Secretary of State of the State of New York, on said 21st day of February, 1901, and in the office of the Clerk of the County of New York on the 23rd day of February, 1901, which said extension was accepted by the Fifth Avenue Coach Company,

your petitioner, plaintiff in error, by certificate of acceptance dated February 23, 1901, and filed in the office of the Secretary of State of the State of New York, and in the office of the Clerk of the County of New York on said 23d day of February 1901, all of which acts were done in pursuance of an Act of the Legislature of the State of New York, which became a law April 25, 1900, and known as Chapter 657, of the Laws of 1900.

(*e*) The contracts made and executed by and between the Fifth Avenue Coach Company, your petitioner, plaintiff in error, and the Railway Advertising Company, a West Virginia corporation, dated respectively May 15, 1905, and May 11, 1907, leasing to said last named company the right to display advertising matter on the interior and exterior of the vehicles of the Fifth Avenue Coach Company, your petitioner, plaintiff in error.

(8) That the said Court of Appeals of the State of New York erred in holding and deciding in favor of the validity of the authority exercised under said ordinance by the City of New York, defendant in error, in that said defendant in error allows other transportation companies than plaintiff in error to display advertising signs on the exterior of their property, thus depriving your petitioner of the equal protection of the laws guaranteed it by the Constitution of the United States, under Section 1 of the fourteenth amendment thereof.

(9) The objection that the said ordinance of the City of New York and the interference by defendant in error with advertisements on the exterior of said stages were repugnant to the Consti-
300 tution of the United States and especially to Section 1 of the Fourteenth Amendment thereto and to Section 10 of Article 1 thereof, was distinctly urged upon the trial of the cause in the Supreme Court of the State of New York, before the Appellate Division of said court, and before the said Court of Appeals as follows:

In and by the tenth point of the printed argument of the plaintiff in error submitted to the Justice before whom the cause was tried, and in and by conclusions of law Nos. 8, 9 and 10, proposed by plaintiff in error, refused by said Justice and duly excepted to.

In and by the ninth point of the printed argument of plaintiff in error submitted to the said Appellate Division.

In and by the ninth point of the printed argument of plaintiff in error submitted to the said Court of Appeals.

Wherefore, the Fifth Avenue Coach Company, your petitioner, plaintiff below and plaintiff in error, prays that the said judgment of the Court of Appeals of the State of New York and the judgment of the Supreme Court of the State of New York be reversed and annulled and altogether held for nothing and that it may be restored to all things which it has lost by occasion of said judgments, etc., and that it may have such other and further relief according to law as to your Court may seem just and proper.

Dated, February 2d, 1909.

PAGE, CRAWFORD & TUSKA,
Attorneys for Plaintiff in Error.

Office and Post Office Address, 32 Liberty Street, Borough of Manhattan, City of New York.

301 [Endorsed:] United States Supreme Court. Fifth Avenue Coach Company, Plaintiff in Error, against The City of New York, Defendant in Error. Assignment of Errors. Page, Crawford & Tuska, Attorneys for Plaintiff in Error, 32 Liberty Street, Borough of Manhattan, City of New York. Service of a copy of an assignment of errors of which the within is a copy is hereby admitted. Dated February 4, 1909. Francis K. Pendleton, corporation counsel, att'y for def't in error.

302 United States Supreme Court.

FIFTH AVENUE COACH COMPANY, Plaintiff in Error,
against
THE CITY OF NEW YORK, Defendant in Error.

Notice.

SIRS: Please take notice that the within citation was this day duly allowed in the above entitled action by Hon. R. W. Peckham, Associate Judge of the Supreme Court of the United States.

Dated February 2, 1909.

PAGE, CRAWFORD & TUSKA,
Attorneys for Plaintiff in Error, 32 Liberty Street, Borough of Manhattan, City of New York.

To Hon. Francis K. Pendleton, Corporation Counsel, Att'y for Def't in Error, Hall of Records, Borough of Manhattan City of New York.

303 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the City of New York and Francis K. Pendleton, Corporation Counsel, its attorney. Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States to be holden in the City of Washington in the District of Columbia, within thirty (30) days from the date hereof pursuant to a Writ of Error filed in the office of the Clerk of the Supreme Court of the State of New York, for the County of New York, in an action wherein the Fifth Avenue Coach Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said Writ of Error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, this 2d day of February, in the year of our Lord, one thousand nine hundred and nine.

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

304 [Endorsed:] United States Supreme Court. Fifth Avenue Coach Company, Plaintiff in Error, against The City of New York, Defendant in Error. Citation. Page, Crawford & Tuska, Attorneys for Plaintiff in Error, 32 Liberty Street, Borough of Manhattan, City of New York. Service of a copy of the within citation is hereby admitted. Dated February 4, 1909. Francis K. Pendleton, Corporation Counsel, Att'y for Def't in Error.

A copy of the within paper has been this day received at the Office of the Corporation Counsel.
Feb. 4, 1909.

FRANCIS K. PENDLETON,
Corporation Counsel.

305 UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Justices of the Supreme Court of the State of New York, possessors of the return and record in the action in which the Fifth Avenue Coach Company is plaintiff and the City of New York is defendant, Greeting:

Because in the records and proceedings, as also in the rendition of a judgment of a plea in the Court of Appeals of the State of New York, wherein final judgment upon return from the Supreme Court of the State of New York was rendered on the 6th day of January, 1909, that being the highest court of law and equity of the said State in which a decision could be had in the suit or action between the Fifth Avenue Coach Company, plaintiff below and plaintiff in error, and the City of New York, defendant below and defendant in error, and which has been remitted to said Supreme Court for execution, and is now before you or some of you in said court; wherein was drawn in question the validity of an ordinance and of the authority exercised and claimed thereunder by said City of New York, defendant in error, on the ground of their being repugnant to the Constitution of the United States, and because the decision was in favor of such validity, a manifest error hath happened to the great damage of the said Fifth Avenue Coach Company as is said and appears by its complaint set forth in its petition and assignment of errors herein, we being willing that such errors, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Justices of the Supreme Court of the United States, at the Capitol in the City of Washington, together with this writ, so that you have the same at Washington in the
306 said Supreme Court before them, the Justices aforesaid within thirty days after the date hereof, that the record and proceedings aforesaid being inspected the said Justices of said Supreme Court may cause further to be done therein to correct that error

what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States this 4th day of February, in the year of our Lord one thousand nine hundred and nine.

[Seal of U. S. Circuit Court, South. Dist. New York.]

JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

Allowed by
R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

Feb'y 1, 1909.

307 [Endorsed:] United States Supreme Court. Fifth Avenue Coach Company, Plaintiff in Error, against The City of New York, Defendant in Error. Writ of Error. Received Feb'y 4th, 1909. [Seal of New York.] Peter J. Dooling. Page, Crawford & Tuska, Attorneys for Plaintiff in Error, 32 Liberty Street, Borough of Manhattan, City of New York.

308 STATE OF NEW YORK,
County of New York:

Clerk's Office of the Supreme Court of the State of New York for the County of New York.

I, Peter J. Dooling, Clerk of the County of New York and of the Supreme Court of the State of New York, for the said County of New York, by virtue of the annexed writ of error which was served upon me on the 4th day of February, 1909, and in obedience thereto, do hereby certify that the foregoing Pages Numbered from 1*a* to 284, Inclusive contain a true and complete transcript of the record and proceedings had in said Court in the suit Fifth Avenue Coach Company *vs.* The City of New York mentioned in said writ of error as the same remain of record and on file in my office and that annexed hereto is the petition for the said writ of error, the Assignment of Errors, the citation to the writ of error with proof of service of the same, and said writ of error served upon me.

In Testimony whereof I have caused the Seal of the said Court to be hereunto affixed at my office in the City and County of New York, on the 5th day of February, 1909.

[Seal of New York.]

PETER J. DOOLING, *Clerk.*

:09 STATE OF NEW YORK.
Court of Appeals, State Reporter's Office, ss:

I, J. Newton Fiero, Reporter of the Court of Appeals of the State of New York, do hereby certify that I have compared the annexed copy of opinion in the case of Fifth Avenue Coach Company *v.* The City of New York, decided by the Court of Appeals on the 5th day of January, 1909, with the official opinion rendered in such case, and I further certify that the same is a true and correct copy of said opinion and of each and every part thereof.

In witness whereof, I have hereunto affixed my signature as Reporter of the Court of Appeals, at the City of Albany, in the State of New York, this 3rd day of February, 1909.

[Seal State of New York Court of Appeals.]

J. NEWTON FIERO,
As Reporter of the Court of Appeals of the State of New York.

Attest:
[L. S.]

R. M. BARBER,
Deputy Clerk of the Court of Appeals

STATE OF NEW YORK,
Court of Appeals:

I, Edgar M. Cullen, Chief Judge of the Court of Appeals of the State of New York, the highest Appellate Court and Court of Record in and for said State, do hereby certify that R. M. Barber is the Deputy clerk of said court, having custody of the seal of said court and of the decisions, minutes and records thereof, and that J. Newton Fiero is the official reporter of said court, having custody of the official opinions, written and handed down by said court and the members thereof, and of the official publication and reports thereof; and, I further certify that the attestation and authentication, by said Deputy clerk and said reporter of the annexed copy of the official opinion rendered in the case of Fifth Avenue Coach Company *v.* The City of New York, decided by the said Court of Appeals on the 5th day of January, 1909, is in due form and sufficient under the laws of the State of New York and the rules and practice of the said Court of Appeals; that the seal imprinted thereon is the true and genuine seal of the said Court of Appeals, and that the signature of R. M. Barber, as Deputy clerk of said court, appended thereto is the true and genuine signature of said R. M. Barber, and the signature of J. Newton Fiero, as reporter of said court, appended thereto is the true and genuine signature of said J. Newton Fiero.

In witness whereof, I have hereunto subscribed my official signature, at the Chambers of said court, at the Capitol of said State, in the City of Albany and State of New York, on the 3rd day of February in the year *of* one thousand, nine hundred and nine.

EDGAR M. CULLEN,
As Chief Judge of the Court of Appeals of the State of New York.

310 FIFTH AVENUE COACH COMPANY, Appellant,
v.
THE CITY OF NEW YORK, Respondent.

(Decided January 5, 1909.)

Appeal from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered June 11, 1908, unanimously affirming a judgment of the New York Special Term dismissing the plaintiff's complaint entered upon the findings of the court.

The nature of the action and the facts, so far as material, are stated in the opinion.

William H. Page for appellant.
Francis K. Pendleton, Corporation Counsel (Theodore Connoly of counsel), for respondent.

CHASE, *J.*:

The plaintiff owns and runs on the route hereinafter described, in the city of New York, a large number of stages. On the 11th day of May, 1907, it entered into an agreement with the Railway Advertising Company by which it granted and leased to said company "The exclusive right and privilege of maintaining advertising signs upon the exterior of each and every coach or omnibus now (then) operated or run, or which may hereafter (thereafter) be operated or run, upon the regular route of said coach company, extending from Eighty-ninth street in the city of New York down Fifth avenue across and to the south side of Washington Park and return and upon any additional route or extension of its route which shall be operated by it" during the term of said lease.

The agreement is to continue until December 31, 1913. It provides that "If at any time any order or judgment of a court having jurisdiction in the premises shall be entered, or any act of the legislature of the state of New York shall be passed, or any ordinance or resolution of the city of New York or of any branch of the city government shall be adopted which forbids the use of the exterior of said vehicles for advertising purposes or which imposes any tax or license fee upon said vehicles by reason of such exterior advertising in addition to the tax or license fee now paid for the same, which additional tax or license fee the advertising company shall refuse to pay, the coach company shall, in any such event, have the right to terminate this agreement upon thirty days written notice to the advertising company."

Since the making of said agreement the plaintiff has operated its said stages for the transportation of passengers at a uniform fare of ten cents for each person, and it has maintained on the exterior of said stages advertisements provided by said advertising company. The advertisements consist of painted scenes and letters which are extravagant and gaudy in appearance. They are fully described

in the record, and a detailed statement of some of such advertisements may also be found in the opinion of the court at
311 Special Term, rendered on the trial of this action which is reported in 58 Misc. Rep. 401. It was found by the trial court as follows: "The defendant through its various officials and officers has interfered with and threatens to continue to so interfere with and to prevent the use of signs on the exterior space upon the stages operated by the plaintiff herein for the display of advertising matter and to cause the removal of said advertising matter."

This action is brought by the plaintiff to permanently enjoin and restrain the defendant from interfering in any way with the advertising signs or matter permitted, placed or used by the plaintiff, or under its direction, on the exterior of said stages.

The plaintiff was incorporated on the 23rd day of July, 1896, "To take and possess the property and franchises of a domestic stock corporation (Fifth Avenue Transportation Company, Limited) sold as hereinafter (in the certificate of incorporation) stated."

The property thus sold and subsequently transferred to the plaintiff, so far as it relates to a franchise, is as follows: "The right to run and drive, or cause to be run and driven, a line of stages or carriages *for the transportation of passengers for hire* from Eighty-ninth street in the city of New York down Fifth Avenue across Washington Park and along South Fifth Avenue to the Bleecker street elevated station and return. Together with all the rights granted to Fifth Avenue Transportation Company limited or acquired under or by chapter 536 of the laws of 1886 and all the rights granted to or acquired by said Fifth Avenue Transportation Company limited under or by chapter 182 of the laws of 1889."

The Fifth Avenue Transportation Company, Limited, was organized October 28, 1885. It went into the hands of a receiver in 1895 and the plaintiff corporation was organized for the purposes stated and to it was transferred on November 3, 1897, the property and franchises for the holding, maintenance and operation of which it was organized.

Chapter 536 of the Laws of 1886 authorized the Fifth Avenue Transportation Company, Limited, and its assigns, "On payment of the license fees as hereinafter (in said statute) provided, to run and drive, or cause to be run and driven, and without further authority from said city, a line of stages, or carriages, for the transportation of passengers for hire, from Eighty-ninth street in the city of New York down Fifth Avenue, across Washington Park, and along South Fifth Avenue to the Bleecker street elevated station and return." Other provisions were included in the act relating to the consent of property owners on the avenues and streets whereon the stages were to be run, the payment of a license fee and the rate of fare.

Chapter 182 of the Laws of 1889 authorizes said Fifth Avenue Transportation Company, Limited, with the consent of the commissioners of the sinking fund and on such terms as they may prescribe, "To run, drive, or cause to be run and driven, and
312 without further authority from said city, a line of stages or carriages for the transportation of passengers and parcels for

hire" upon the streets therein named including the streets mentioned in the act of 1886.

Chapter 657 of the Laws of 1900 authorizes a corporation operating a lawfully established stage route as therein provided and upon the authority and consent therein provided to extend its route and to operate the route so extended with stages and omnibuses propelled by electricity or any other motive power. The plaintiff has since materially extended its route and it is now operating its stages by motor power pursuant to the franchises obtained as stated and defined in said acts of the legislature. The stages were drawn by horses prior to 1907. Such franchise does not expressly include the right to use the public streets mentioned therein for advertising purposes or to carry or maintain exterior advertisements on its stages and the carrying of such advertisements is not a necessary or essential incident to its express franchise rights. Such exterior advertising is in no way related to the carrying of passengers for hire.

The defendant has provided by ordinance as follows: "No advertising trucks, vans or wagons shall be allowed in the streets of the Borough of Manhattan under a penalty of $10 for each offense. Nothing herein contained shall prevent the putting of business notices upon ordinary business wagons, so long as such wagons are engaged in the usual business or work of the owner and not used merely or mainly for advertising."

A wagon is defined to be a wheeled carriage; a vehicle on four wheels. The defendant's charter provides that the word vehicle "shall be deemed to include wagons, trucks, carts, cabs, carriages, stages, omnibuses, motors, automobiles, locomobiles, locomotives, bicycles, tricycles, sleighs or other conveyances for persons or property." The plaintiff's stages are also called indiscriminately carriages, coaches and omnibuses. They are vehicles on four wheels designed primarily for the carriage of passengers, and they are wagons within the meaning of the ordinance. The fact that they are now propelled by motors instead of being drawn by horses has not changed their character as wagons or removed them from the prohibition of the ordinance.

The second sentence of the ordinance is a part of the same paragraph and the two sentences read together show the intention of the legislative body. It bears evidence in itself that it was not intended to refer exclusively to wagons wholly used for the display of advertisements. Business notices upon ordinary business wagons are not prohibited so long as such wagons are engaged in the usual business or regular work of the owner, but even such notices are prohibited on wagons used merely or mainly for advertising. General advertising for hire is by the ordinance prohibited whether carried on wagons wholly used for advertising or in connection with the ordinary or usual business in which the wagons are engaged. The second sentence of the ordinance was wholly unnecessary unless the negative in the first sentence was intended to prohibit general advertising on wagons even if they are not wholly devoted to that use.

313 Power to make ordinances is given by the defendant's charter to the board of aldermen. It is therein provided as fol-

lows: "The board of aldermen shall have power to make * * * all ordinances * * * not contrary to the laws of the state, or the United States, as they may deem necessary to carry into effect the powers conferred upon the city of New York by this act, or by any other law of the state, or by grant; and such as they may deem necessary and proper for the good government, order and protection of persons and property, and for the preservation of the public health, peace and prosperity of said city, and its inhabitants. * * *." (Section 43 of said charter, as amended by chapter 629, Laws of 1905.)

"* * * The board of aldermen in addition to all enumerated powers may exercise all of the powers vested in the city of New York by this act, or otherwise, by proper ordinances * * * not inconsistent with the provisions of this act, or with the constitution or laws of the United States or of this state * * * may from time to time ordain and pass all such ordinances * * * applicable throughout the whole of said city or applicable only to specified portions thereof, as to the said board of aldermen may seem meet for the good rule and government of the city, and to carry out the purposes and provisions of this act or of other laws relating to the said city * * *." (Section 44 of the charter as so amended.)

"Subject to the constitution and laws of the state, the board of aldermen shall have power to regulate the use of streets and sidewalks by foot passengers, animals or vehicles; * * * to regulate the use of the streets for signs * * * and other purposes; to regulate the exhibition of advertisements * * * and to make all such regulations in reference to the running of stages, omnibuses, trucks and cars as may be necessary for the convenient use and the accommodation of the streets * * *." (Section 50 of charter as so amended.)

That the defendant owns in fee the streets and avenues over which the plaintiff runs its stages is not disputed. Such streets are held in trust for public uses. In *Osborne v. Auburn Telephone Company* (189 N. Y. 393, 397) this court say: "Cities which own the fee in the streets may contract, lease or grant their use for public or municipal purposes not inconsistent with nor prejudicial to the public easement or use for street purposes. In such cases the fee having been transferred to the municipality, it can grant rights in the streets other than for street purposes which do not impair the public easement." The converse of such statement is true, and a city which owns the fee of its streets can refrain from granting rights therein that are not for street purposes.

This case is not one like *N. Y. Mail & Newspaper Transportation Co. v. Shea* (30 App. Div. 266) to prevent the consummation of a contract made in behalf of a city, nor of *Interborough Rapid Transit Co. v. City of New York* (47 Misc. Rep. 221) and other similar cases construing a lease made by the city. In this case the plaintiff without express authority to maintain advertisements on the exterior of its stages seeks to enjoin the defendant from interfering with such advertisements notwithstanding its express prohibitive ordinance.

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It was stated in *N. Y. Mail & Newspaper Transportation Co. v. Shea* (*supra*) by Judge Cullen, then sitting in the Appellate Division, that a contract made by the late trustees of the New York and Brooklyn Bridge with a corporation by which they authorized it to lay and operate a pneumatic tube on said bridge, could be wholly abrogated by said trustees and that the corporation would have to submit. Said bridge and its approaches are owned in fee, and the judge there said, referring to the contract, that it and all similar contracts "must be construed as made subject to what we may term the governmental or legislative power of the bridge authorities over its public use." (p. 270)

Conducting a private business and using private easements in public streets, even where expressly authorized by the municipality, are frequently condemned. (*Hatfield v. Straus*, 189 N. Y. 208; *State ex rel. Belt v. St. Louis*, 161 Mo. 371; *People ex rel. Healy v. Clean Street Company*, 225 Ill. 470.)

In further considering the authority of defendant to enact said ordinance the language of the charter may be repeated in so far as it says that the board of aldermen may make such ordinances "as they may deem necessary and proper for the good government * * * of said city and its inhabitants," and also, "as to the said board of aldermen may seem meet for the good will and government of the city."

The board of aldermen are thus the judges as to what ordinances they will pass to carry out and preserve the interests of the municipality and unless an ordinance passed by them is wholly arbitrary and unreasonable it should be upheld. The necessity and advisability of the ordinance is for the legislative power to determine. The presumption is in favor of the ordinance.

The validity of a statute is not alone to be determined by what has been done in any particular instance, but by what may be done under it. (*City of Rochester v. West*, 164 N. Y. 510.)

The plaintiff is engaged in the transportation of passengers and at the same time in running advertising wagons. The exterior advertisements carried by it are not seen by its passengers, but they are such that they can be seen in the streets of the city and in Central Park when the view is not obstructed for a distance of one-half mile.

Fifth avenue is an important and much-used street. At certain times of the day slow-moving trucks are barred therefrom on account of the congestion in such street. The plaintiff's contract with the advertising company allows the advertisements on its stages to become the conspicuous part of their exterior, and the business of advertising for the purpose of revenue is of such value to the plaintiff that the gross income therefrom exceeds six per cent. upon its entire capital stock.

The contract with the advertising company includes "each and every coach or omnibus now operated or run, or which may hereafter be operated or run" by it, and the compensation is dependent
315 upon the number so operated and run. The number has continually increased. Such advertising for hire clearly tends

to increase the number of plaintiff's stages in such important and much-used street, and constitutes a substantial reason, not only for the continuance of the present number of stages therein, but also for the further increase of the number thereof. Every procession, parade or show upon vehicles passing through a public street tends to congestion therein, and to some extent interferes with those engaged in business or having their homes thereon.

It appears that the right to display garish advertisements in conspicuous places has become a source of large revenue. If the plaintiff can cover the whole or a large part of the exterior of its stages with advertisements for hire, delivery wagons engaged by the owners in their usual business or regular work can rightfully be covered with similar advertisements. Cars and vehicles of many descriptions, although not engaged exclusively in advertising, and thus not incumbering the street exclusively for advertising purposes, may be used for a similar purpose. The extent and detail of such advertisements when left wholly within the control of those contracting therefor would make such stages, wagons or cars a parade or show for the display of advertisements which would clearly tend to produce congestion upon the streets upon which they were driven or propelled. The exaggerated and gaudy display of advertisements by the plaintiff is for the express purpose of attracting and claiming the attention of the people upon the streets through which the stages are propelled.

In *Commonwealth v. McCafferty* (145 Mass. 384) the court, referring to an ordinance which provided "No person shall place or carry, or cause to be placed or carried, on any sidewalk, any showboard, placard, or sign for the purpose of there displaying the same," say: "The purpose of the ordinance in question is to prevent the placing of showboards and signs upon the sidewalks so as to obstruct them, and also to prevent the carrying of placards and signs for the purpose of displaying them, of which the tendency and effect might be to collect crowds, and thus to interfere with the use of the sidewalks by the public, and lead to disorder. We cannot say that such a provision applicable to the crowded streets of a populous city is unreasonable."

The board of aldermen were not wholly arbitrary and unreasonable in passing the ordinance that we have quoted. This action is brought by the plaintiff in equity to enjoin the city from interfering with the maintenance of such exterior advertisements on its stages. It has failed to show that the maintenance of such exterior advertisements is within its express franchise rights or that such ordinance prohibiting their maintenance on its stages is not a proper exercise of the authority vested in the city to regulate the business conducted in the streets thereof, and the trial court was, therefore, right in dismissing the plaintiff's complaint.

The judgment appealed from should be affirmed, with costs.

Cullen, Ch. J., Edward T. Bartlett, Haight, Vann and Willard Bartlett, JJ., concur; Gray, J., concurs in result.

Judgment affirmed.

316 [Endorsed:] Supreme Court of the United States. Fifth Avenue Coach Company, Plaintiff in Error, *against* The City of New York, Defendant in Error. Opinion and certificate of clerk of Court of Appeals. Page, Crawford & Tuska, Attorneys for Plaintiff in Error, 32 Liberty Street, Borough of Manhattan, New York City.

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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1910.

No. 159.

FIFTH AVENUE COACH COMPANY,
Plaintiff in Error,

vs

THE CITY OF NEW YORK.

BRIEF FOR PLAINTIFF IN ERROR.

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Supreme Court of the United States,

OCTOBER TERM, 1910.

No. 159.

FIFTH AVENUE COACH COMPANY,
Plaintiff in Error,

vs.

THE CITY OF NEW YORK.

BRIEF FOR PLAINTIFF IN ERROR.

Writ of error to review a judgment of the Supreme Court of the State of New York, dismissing the complaint herein, which demands an injunction restraining defendant in error from causing the removal of advertising signs displayed by third parties upon space leased for the purpose on the exterior of plaintiff's stages, which are operated in certain streets in the city of New York.

Statement.

The certificate of incorporation of the "Fifth Avenue Transportation Company, Limited," authorized it to (Rec. 9):

"carry passengers and property for hire * * maintain and *operate stage* * * *routes for public use in the conveyance of persons and property* * * *and to* * * *lease,* hold, use, sublet, sell and exchange all such real estate and other *property* as may be necessary, or *convenient for the establishment, maintenance and operation of its business* * *."

The company thus formed was authorized by special acts of the State of New York, to establish and operate stages in the conduct of its business upon Fifth Avenue and specified streets of the City of New York (Rec. 9, 10).

By reorganization proceedings as stated by the COURT OF APPEALS (Rec. 173) and as found specifically by the Trial Court (Rec. 10-12) the plaintiff in error succeeded to and now conducts this business under these stage route franchises, with the powers above specified, among others, as hereinafter set forth (page 69 under our "Fourth Point").

On May 15, 1905, plaintiff entered into a contract with the Railway Advertising Company, leasing portions of the interior wall space of the stages for the display of advertisements, and of exterior space for the display of "four flags or signs for the purpose of advertising" (Rec. 42, 113, 114). Since that time the space leased as aforesaid has been used by the Advertising Company accordingly (Rec. 20, 40, 109).

The stages as shown by the photographic exhibits (Rec. 139 *et seq.*), have an upper deck with seats for eighteen passengers (Rec. 19), a structural feature which makes it necessary to have a tight screen about two feet high along the edge of the roof on both sides and at the ends, the screen

acting as a guard rail and wind shield, and also as a protection to passengers from the gaze of people in the street. The spiral staircase to the roof is, for similar reasons, also provided with a screen (Rec. 19).

In May, 1907, a further contract supplementing the contract of 1905 was made whereby the exterior space on these wind guards, or screens, was leased for a term of years by plaintiff to the same Advertising Company at a rental of $10,000 and $200 per stage per annum (Rec. 19, 37).

The Railway Advertising Company began almost immediately to display its advertisements on the new space (Rec. 13, 14). Hostile criticism of the advertisements from an aesthetic point of view followed. No other criticism was offered, but the City was induced to take action, and through its various officials, actually interfered with and threatened to continue to interfere with, and to prevent such use of the exterior space, and to cause the removal of the signs (Rec. 22).

Thereupon this action was brought in the New York Supreme Court to obtain an injunction restraining the City from carrying its threats into effect (Rec. 5) the plaintiff alleging among other things that such action would (Rec. 5)

"Infringe its constitutional right to freedom in the use of its property."

In its answer, defendant pleaded the general issue and alleged as an affirmative defense that the display of the advertisements in question was a violation of the following City ordinance. (Rec. 7):

"No *advertising* trucks, vans or *wagons* shall be allowed in the streets of the Borough of Manhattan under a penalty of ten dollars for each offense. Nothing herein contained shall prevent the putting of business notices upon ordinary business wagons so long as such wagons are engaged in the usual business or work of the owner, and not used merely or mainly for advertising."

and was therefore an unauthorized use of the streets and a nuisance.

Upon the trial, judgment was rendered dismissing the complaint on the merits (Rec. 32), and on appeal, this judgment was affirmed by the APPELLATE DIVISION OF THE SUPREME COURT (Rec. 152), and by the COURT OF APPEALS (Rec. 155).

The COURT OF APPEALS based its affirmance *mainly* on the ordinance, holding that the display of advertisements on the stages made the latter "advertising wagons" within the meaning of the above ordinance (Rec. 174), and that the ordinance was reasonable and a proper exercise of the authority vested in the City (Rec. 177), although it also stated that the plaintiff had failed to show that it had an express franchise right to maintain exterior advertising (Rec. 177).

We contend that the ordinance as thus construed by the COURT OF APPEALS is an unlawful exercise of the police power of the State, in that it arbitrarily deprives plaintiff of a valuable and vested property right, viz: the right to rent space on its vehicles to third parties who use it for the display of advertisements, which (as shown hereafter) have been judicially declared in this case to be unobjectionable in character; that the ordinance denies to plaintiff the equal protection of the laws; and that it violates the obligation of the contracts between the company and third par-

ties as well as between the company and the state.

The Trial Court found (as a matter of fact) that (Rec. 20):

"The advertising signs displayed on the stages of the Fifth Avenue Coach Company, the plaintiff herein, *have no relation to the physical comfort, safety, health or convenience of the passengers or public, or the operation of the stages.*"

The Court found as conclusions of law that. (Rec. 22, 30 and 31):

"The advertisements in question are not a nuisance." * * * * * *

"The advertisements in question cannot be judicially condemned on aesthetic grounds." * * *

"The health, physical comfort, safety and morals of passengers and of the public, are not injured by the display of the exterior advertisements which have appeared on plaintiff's stages."

This last finding is essentially one of fact, rather than of law.

These findings were not disturbed by the Appellate Division or Court of Appeals, they cannot be disputed by defendant in error, and, in any event, this court will not re-examine questions of fact upon writ of error.

U. S. Rev. Stat. Sec. 1011.
Miles v. *United States* 103 U. S. 304, 313.
Turner v. *New York*, 168 U. S. 90, 95.
Rhodes v. *Iowa*, 170 U. S. 412, 437.

The writ of error herein was allowed by the late Mr. Justice Peckham (Rec. 170).

Specification of Errors.

The errors assigned upon which the plaintiff in error will rely are as follows:

(1) Error in holding and deciding that the ordinance passed by the Board of Aldermen of the City of New York on the 30th day of October, 1906, and approved by the Mayor on the 8th day of November, 1906, being Section 41 of Chapter 2, of Article IV of Part Two of the Code of Ordinances of said City, providing as above quoted, was a valid exercise of the legislative authority granted to said Board of Aldermen and said Mayor by the Legislature of the State of New York; and that the City of New York, the defendant in error, has the right, by virtue of said ordinance, to interfere with the display of advertising signs on the exterior of plaintiff's stages and to cause the removal thereof; and that such ordinance and such interference were a proper exercise of the authority vested in the said City to regulate the business conducted in the streets thereof, and that the plaintiff in error had no remedy against the defendant for the taking of its private property by said interference with said advertisements, thereby holding and deciding that said plaintiff might be deprived of its property aforesaid without due process of law, in violation of the CONSTITUTION OF THE UNITED STATES, and especially of Section 1, Article XIV of the amendments thereto (Rec., 164).

(2) Error in holding and deciding that the display of advertisements on said stages was unlawful, because forbidden by the ordinance of the

City of New York hereinbefore referred to, and also in holding and deciding that the Board of Aldermen and Mayor of said City had power and authority to enact said ordinance, and by enacting it to forbid and make unlawful the display of advertisements on said stages, said decisions being in contravention of Section 1 of the Fourteenth Amendment to the CONSTITUTION OF THE UNITED STATES, which declares that no State shall deprive any person of property without due process of law (Rec., 165).

(3) Error in holding that the application to plaintiff in error of said ordinance of the City of New York, does not violate the provisions of the 14th amendment of the CONSTITUTION OF THE UNITED STATES, providing that a person shall not be deprived of property by the State without due process of law, and further in holding that the display of advertisements on the exterior of plaintiff's said vehicles is not a property right appurtenant to the ownership of private property, and further in sustaining the validity of said ordinance as applied to plaintiff in error, the effect of all of which has been to deprive the said plaintiff below, your petitioner, the plaintiff in error, of its property without due process of law in violation of the provisions of the CONSTITUTION OF THE UNITED STATES aforesaid (Rec., 165).

(4) Error in holding and deciding in favor of the validity of the authority exercised by the City of New York, the defendant in error, namely, the authority to deprive said plaintiff in error of its property right to lease space for the display of

advertisements on the exterior of its vehicles as appurtenant to the ownership of personal property without compensation to it and without due process of law, which said deprivation violates Section 1, Article XIV of the amendments of the CONSTITUTION OF THE UNITED STATES (Rec., 165).

(5) Error in holding and deciding in favor of the validity of the authority exercised under said ordinance by the City of New York, defendant in error, in that said defendant in error allows other transportation companies than plaintiff in error to display advertising signs on the exterior of their property, thus depriving your petitioner of the equal protection of the laws guaranteed it by the CONSTITUTION OF THE UNITED STATES, under Section 1 of the fourteenth amendment thereof (Rec., 165).

(6) Error in holding that the adoption of the ordinance of October 30, 1906, hereinbefore referred to was not an impairment of the obligation of the contract of May 15, 1905, covering interior and some exterior advertising, made by the plaintiff in error with the Advertising Company (Rec. 167) and of the contract between plaintiff in error and the State by which the extension of additional routes was assumed and automobile stages were substituted and operated in lieu of horse drawn vehicles under the act of April 27, 1900 (Rec. 166, 167).

The legal questions presented by the above assignments of error are summarized, and, in the

form of propositions with references to the pages at which they are argued hereinafter, may be stated by way of preface, as follows:

SUMMARY OF POINTS.

PAGES.

(1) The plaintiff in error possesses a vested property right to rent space for the display of advertisements upon its stages which is incidental to the ownership of the stages. The doctrine of *ultra vires* has no application 10

(2) The ordinance in question, as construed by the Court of Appeals of the State of New York, is an unlawful exercise of an assumed police power, which operates to deprive the plaintiff in error of its property without due process of law, and in contravention of the Fourteenth Amendment of the Federal Constitution..... 32

(3) The ordinance denies to plaintiff in error the equal protection of the laws, within the meaning of the Fourteenth Amendment of the Constitution of the United States 57

(4) The ordinance impairs the obligations of the contract between the plaintiff and the Railway Advertising Company, and of the contract subsisting between the State of New York and the plaintiff..... 64

The propositions thus stated will now be successively considered as follows:

FIRST POINT.

The plaintiff in error possesses a vested property right to rent space for the display of advertisements upon its stages, which is incidental to the ownership of the stages. The doctrine of ultra vires has no application.

This point was raised by plaintiff's exception "[13]" (Rec. 33) to the "Forty-fifth" Finding of the Trial Court (Rec. 22) which reads viz:

"*Forty-fifth.*—The plaintiff is not authorized, either by its charter or by law to display advertising signs on the exterior of its stages."

The point is also raised by exceptions Nos. [18], [19], [21], [23] and [24] (Rec. 33) made respectively to the "Eighth", "Ninth" (Rec. 22), and "Eleventh" (Rec. 23) Conclusions of Law of the Trial Court and to the refusal of the Trial Court to find plaintiff's Proposed Finding of Fact No. "(30)"—(Rec. 29) and Proposed Conclusions of Law Nos. "(1)" and "(6)"—(Rec. 30, 31).

(Assignment of Errors, Nos. "(4)" and "(5)" (Rec. 165).

Under the rule as stated in

Hoadly v. *San Francisco,* 124 U. S., 639, 645,

it is necessary to first consider the nature and existence of the property right which plaintiff in error claims is affected.

The renting of space to be used for the display of advertisements is a property right belonging to the plaintiff in error, incidental to its ownership of the Fifth Avenue Stages.

Foster v. *London, etc. Ry. Co.* (Court of Appeal), L. R. (1895) 1 Q. B. D., 711, is an instructive case.

The defendant railway company acquired by condemnation a strip of land, on which it constructed a railway carried over a series of arches. The company rented the space under the arches for purposes foreign to its business, together with small lots of land adjacent to the arches. The plaintiff contended that this action was *ultra vires*, and asked for an injunction. It was held by the Judges of Appeal that the defendant had acted within its rights, and that what it had done was a lawful exercise of its implied powers. Opinions were delivered by HALSBURY, LINDLEY and SMITH, Judges of Appeal.

LORD HALSBURY said (p. 716, italics ours):

"*It is said that the use which the defendants make of this particular piece of land is one not authorized by the statute. Expressly authorized by the statute it is not. No minute or ancillary use of such part of a railway company's property is ever expressly given by statute; but, I think, it might just as reasonably be contended that railway company are not entitled to sell the hay which grows on their banks or cuttings so as to make something out of it. In fact, it would be possible to specify a great variety of uses which might be made of part of a company's property, which do not form a necessary portion of the business of carrying passengers or goods, and yet are uses not inconsistent with the purpose for*

which the statute has incorporated the Company. Now, let us see what this particular use is. The company are carrying their line of railway along a line of arches. The arches, I presume, are a cheaper form of support than a solid embankment. This causes a number of hollow spaces to be left which may be used for a variety of purposes. They may be used for the purpose of shops, or for habitations, although they would not be very comfortable, but at all events, for various purposes. The maintenance of the railway involves the existence of these arches. But, it is said that the company must not use them for any other purpose. *It seems to me that that is an entire misapprehension of all the cases.* The authorities seem to me to run all one way, but not in favor of the view which was contended for by the plaintiff."

In the concurring opinion of LINDLEY, *L.J.*, the following occurs on page 720 (italics ours):

"There is nothing in the company's act which expressly authorizes the letting of these arches. Then comes the question whether it is to be fairly implied, and if so, what is the limit of power? Now, it appears to me that, with the exception of one single case before MALINS, *V. C.*, all the authorities are consistent with the proposition that *any mode of enjoying a company's own land is impliedly permitted, if it is not inconsistent with the provisions of the company's acts, and is not an infringement of the rights of other persons.* With the single exception of that case before MALINS, *V. C.*, I have not found one authority which is inconsistent with that. The legislature does not specify anything upon the point, but it specifies expressly the purposes for which the company is formed. It gives the railway company power to acquire land and power to use that land for any purpose which *does not infringe the rights of others,* and is not inconsistent with the pur-

poses for which the company was formed. *I believe that is the true and sound proposition.*"

In the concurring opinion of SMITH, *L.J.*, the following occurs on pages 721-722 (italics ours):

"Now, it has been argued on his behalf that inasmuch as the railway company purchased this land for the purpose of their railway, the letting of these arches and the adjuncts in the rear for profit, is not a letting for the purpose of carrying on their railway, but is *ultra vires*, and can be restrained at his instance in a court of law. In the first place, I would point out that no legal right of the plaintiff has been infringed. He cannot say that he has suffered any damage for which he could bring an action against the railway company, and therefore it is contended that as he has no such right he has no *locus standi* at all in the present action. *But I do not decide this case upon this question;* I decide it on the ground that I am satisfied on the authorities cited that *there is no foundation for the proposition* which is put forward by the plaintiff, that when a railway company has purchased land for the purpose of a railway, they are not authorized to do anything more thereon than to run trains backwards and forwards, and to have stations and so on for the purposes of carrying goods and passengers upon their railway."

It is worth while to observe the points of resemblance between the case just cited and the case now before this Court. The defendant corporation in the case cited was a common carrier of passengers; so is the Fifth Avenue Coach Company. Both corporations operate under franchises granted by the Legislature, and each corporation uses its own property in such operation. The defendant in the case cited was attacked for

renting a part of its property for which it had no use, from which renting it derived a revenue. The Fifth Avenue Coach Company is attacked for doing the same thing; the renting of useless space under the arches of the English Railway being identical, in principle, with the renting by the Fifth Avenue Coach Company of the otherwise useless screen surface upon its omnibuses. In the English case the railway corporation had no express authority to do the act complained of. Yet the English Court of Appeal found no difficulty in justifying the action of the company on the doctrine of implied powers.

The case of *Nantasket Beach Steamboat Co.* v. *Shea*, 182 Mass., 147 (1902), is in point.

In this case the plaintiff Steamboat Company leased a hotel to lessees who failed to pay the rent and finally surrendered the premises. The action was brought to enforce bonds given by the defendants to secure payment of the rent. It was contended that the lease was *ultra vires.* The Supreme Court of Massachusetts held that this objection was untenable and permitted recovery by the plaintiff. The opinion of the Court was by MORTON, *J.*, who said (p. 149):

"If the purchase of the hotel property was in excess of the powers of the plaintiff, nevertheless it has a title to it good as against all the world, except perhaps the Commonwealth; and we do not see why it cannot sell it or lease it, and if it can lease it why it cannot recover on a guaranty by a third person that the rent shall be paid. The power to lease is an incident of the ownership."

The decision was put upon the broad ground that, the Steamboat Company being the *owner*

of the property, the right to lease it was *incidental to such ownership,* and that the act of leasing did not amount to embarking in a new and distinct business.

In *State of Louisiana* v. *N. O. Warehouse Co.,* 109 Louisiana, 64, the right of the defendant corporation to lease surplus property to be used in a totally different business from that which it was authorized to transact, was directly challenged by the State itself, but was upheld by the Supreme Court of Louisiana.

In *Benton* v. *City of Elizabeth,* 61 New Jersey Law, 411, the New Jersey Supreme Court held that a railroad corporation owning land in fee might grant an easement therein to another corporation, for a use *not within the corporate powers of the grantor* but *within those of the grantee,* and that *private persons having no interest in the land could not question the validity of the grant.*

See also *Coal Creek, etc., Co.* v. *Tenn. etc. Co.* 106 Tenn. 651.

In *French* v. *Quincy,* 3 Allen 9, the question was whether the Town of Quincy might lease rooms in the Town house, which were not needed for public purposes. It was held that this might be done as a power incidental to the powers of the municipal corporation. Yet the act, thus permitted, lacked every element of an incidental corporate power, as usually defined. That is to say, the leasing of the rooms was not necessary to the exercise of the powers of the Town corporation, or to the performance of its corporate duties,

or to the accomplishment of the objects and purposes of the corporation.

Exactly the same point was decided in favor of similar municipalities, in *Spaulding* v. *City of Lowell,* 23 Pickering, 71; *Worden* v. *City of New Bedford,* 131 Mass., 23; and *People* v. *City of Platteville,* 71 Wis., 139, and the remarks just made apply with equal force to these cases.

In *Forrest* v. *Manchester Ry. Co.,* 30 Beav., 40, the question was whether a company which had power to operate a ferry, had the right to use the ferry-boats to make excursions to other points than the ferry *termini.* Sir John Romilly, *M. R.,* said (pp. 47-48; italics ours):

"The evidence satisfies me that the steamboats are kept for the purpose of performing the obligation which the company have entered into with the legislature, and with the public through the legislature, and which they are bound to perform. What are they to do with those steamboats at other times when unemployed at the ferry? Are they to keep them idle? I am of opinion that they are not, and that if the capital of the company is really embarked for the purpose of the ferry and not for the purpose of excursions, when the steamboats are not required to carry over the persons who wish to use the ferry, they are at liberty to use them as they think fit for the *profit of the company,* and either to let them out to private parties for excursions or to carry excursion parties themselves."

In *Brown* v. *Winnisimmet Co.,* 11 Allen, 326, the question was, whether a Ferry Company had the right to lease for temporary use one of the boats of the company not at the time engaged

in the ferry service. The Court, per BIGELOW, *C. J.*, said (p. 334, italics ours):

"We know of no rule or principle by which an act creating a corporation for certain specific objects or to carry on a particular trade or business, is to be strictly construed as prohibitory of all other dealings or transactions not coming within the exact scope of those designated. Undoubtedly the *main business* of a corporation *is to be confined* to the class of operations which properly appertain to the *general purposes* for which its charter was granted; but it may also enter into contracts and engage in transactions which are incidental or auxiliary to its main business or which may become *necessary, expedient or profitable in the care and management of the property* which it is authorized to hold under the act by which it was created."

All the corporations, whose rights were considered in the cases cited, were alike subject to the rule that corporations have no powers except those expressly granted by the Legislature, and in every case the particular power sustained was not given expressly by charter, but was upheld as an implied incidental or appurtenant property right, and we submit that if the power to rent archways under a railroad, or to rent rooms in a Town House which are not used by the town officers, or to lease ferry-boats not in use, by ferry companies, is such a property right, it is difficult to see why the right to rent vacant spaces on the plaintiff's stages to an advertising company is not of the same character.

This doctrine, including the language last above quoted from the Massachusetts Case, has received the explicit approval of this Court in a case where the right of a railway company to

lease and maintain a Summer hotel at its seaside terminus was questioned. The case referred to is that of

> *Jacksonville, etc., Railway & Navigation Co.* v. *Hooper,* 160 U. S., 514, 525.

A close parallel to *Foster* v. *London, etc. Ry. Co.* (*supra*), is to be found in *N. Y. M. & N. Trans. Co.* v. *Shea,* 30 App. Div. (N. Y.) 266, where the Trustees of the Brooklyn Bridge leased to a private business corporation the right to maintain pneumatic tubes along the Brooklyn Bridge for the transit of small articles. It was held that the trustees had this right.

The Brooklyn Bridge was originally owned by a private corporation, but in the course of construction was taken over by the two cities of New York and Brooklyn, and became public property, the change of ownership involving the substitution of a new public Board of Trustees for the Directors of the private corporation. Neither the one corporate body nor the other, however, had express power given to it, to use the structure of the bridge for any other purpose than furnishing a public highway from Brooklyn to New York. The Court found no difficulty in justifying the lease of the pneumatic tube privilege. The Court said by JUDGE CULLEN (p. 269, italics ours):

"It cannot be denied that the board of directors of the old corporation would have had ample authority to grant these *private* privileges, which in no manner interfered with or obstructed the public use of the bridge. In my opinion, the same power was transferred to and vested in the Trustees. * * * It is neither asserted in the affidavits

on the part of the defendant, nor was it contended for on the argument in his behalf, that the plaintiff's tube line, to any extent, obstructs public travel on the bridge, endangers its safety, or interferes with its proper maintenance. We think, therefore, it was one of those *private privileges,* similar to the stringing of the telephone and telegraph wires or the *leasing of the stores* which were within the power of the Trustees to grant."

In the Brooklyn Bridge case the Court said also (p. 268, italics ours):

"There is no statute conferring in express terms upon the trustees of the bridge, power to contract with private parties for the use of any part of the public property held as part of or in connection with the bridge structure, except that of 1897, with reference to railroads. *The general rule of law is, that municipal corporations cannot, without express statutory authority, alienate or dispose of property of a public nature in violation of the trust upon which it is held.* * * * *But it has the implied right to lease or dispose of property, real or personal, of the corporation of a private nature, unless restrained by charter or statute.*"

In support of this proposition, the Town House cases hereinbefore referred to were cited.

It will be seen that the power of the Bridge Trustees to make the lease in question, was based upon their implied right to lease or dispose of the property of the corporation of a *private nature* unless restrained by charter or statute, the court meaning by the word "*private*" to indicate property not necessarily used in performing a public corporate function. This part of the decision is exactly applicable to the present case. The use of the vacant screens on the plaintiff's stages is a

part of the private property of the plaintiff, just as the use of the bridge structure to sustain the pneumatic tubes was a part of the private property of the public corporation having control of the bridge; and just as the Bridge Trustees had power to dispose of the Bridge property of a private nature, so we submit that the plaintiff has the inherent power to dispose of its own private property.

We believe the Brooklyn Bridge case to be identical in principle with *Foster* v. *London, etc., Ry. Co.* (*supra*), the only difference in the facts being that the Brooklyn Bridge Company is in the fullest sense a public corporation. This fact makes no difference whatever in the application of the doctrine common to both cases, namely, that a corporation has power as an *incident of ownership,* to obtain revenue by renting its unused property for purposes not expressly authorized by Charter, provided only that such action by the corporation is not antagonistic to its chartered purposes, and does not interfere with the rights of others.

In the case of *Union P. R. Co.* v. *Chicago, R. I. & P. R. R. Co.*, 51 Fed. Rep., 309 (C. C. A.), the Union Pacific Ry. Co. made a long lease to another railroad company of the joint use and occupancy of a bridge owned by it across the Missouri River and of its terminal facilities at Omaha, together with about seven miles of its track. It was objected that this was *ultra vires,* because the charter of the Union Pacific Ry. gave no express power to make any such contract. The Circuit Court of Appeals held that since the joint use did not interfere with the present or prospective use of the property leased by the lessor, or with the duties which it owes to the United States Govern-

ment under its charter, such a lease was not to be considered as *ultra vires* and the decision was put upon the same ground as the cases already cited.

The decision was affirmed in 163 U. S. 564.

The case of *Interborough Co.* v. *New York*, 47 Misc., 221, involved the right of the Interborough Company to rent space for advertising signs and weighing machines in the New York Subway. No express power to do this was conferred by any of the documents upon which the property rights of the Interborough Company depended.

Judge BISCHOFF, in his opinion granting a preliminary injunction, sustained the right of the company as an incidental power resting upon what he calls a universal custom in the operation of railways. Subsequently the same case came to trial before Mr. Justice MCCALL, whose decision was favorable to the Subway Company and is reported in 53 Misc., 126. Judge MCCALL said (p. 129, italics ours):

"Upon the trial had, it has been demonstrated that these various privileges (advertising, etc.) are *incidental* to the operation of the road; that they afford a great source of revenue, and their *use and maintenance* is practically a *universal custom.*"

The recent case of *City* v. *Interborough R. T. Co. and N. Y. City Interborough R. Co.*, 125 App. Div. (N. Y.), 437, APPELLATE DIVISION, First Department, March, 1908, affirmed without opinion, 194 N. Y. 528, upheld the right of the Interborough Rapid Transit Company to use ducts *forming part of the construction of the Subway*, for the transmission of electric current sold by

it to a surface railway company. A majority of the Court held that the Interborough Rapid Transit Company, being in effect a lessee of the Subway from the City, possessed the right which was questioned, as an *incident to the lease.* Justice McLaughlin said (p. 443, italics ours):

"A lessee of real property is entitled to the exclusive use of demised premises for *any purpose not prohibited by the lease,* not amounting to waste or destruction of the subject matter. This is the general rule. (Cases) The lessee of this road, as it seems to me,—subject to the duty to operate the road to its 'fullest capacity' for the transportation of passengers, including their comfort and convenience,—has, under its lease, all the other rights usually conferred upon a lessee of real property."

Again, Justice McLaughlin said (page 444, italics ours):

"The right to make this use of the ducts, so long as it does not interfere with the operation of the Rapid Transit Railroad, I am of the opinion, passed to the lessee, as one of the things granted. It is an *incident to the full enjoyment of the demised property.*"

The Appellate Division put the right to use the ducts upon the ground, that such right was an *incidental right of the lessee* of the Subway, and that the City, having granted a lease without reservation as to the ducts, the right to use them in the manner objected to passed as an incident of the lease to the owner thereof.

Suppose there were no advertisements on the plaintiff's screens, but the plaintiff chose to

paint the latter in hideous colors. Could its right to do so be disputed? Or if, instead of merely presenting an offensive color scheme to the public, the appellant should paint a landscape upon the screens, has the city or anyone else the right to interfere? Or, if again, the appellant chooses to allow third parties to paint upon these screens advertisements of merchandise, how can it be said to have participated in an illegal act when it is simply permitting the use of its property, which would otherwise remain idle, without injuring any one? The stages are, in structure, no different from what they would be if there were no advertisements (Rec., 37). The screens are an integral and necessary part of the vehicle (Rec., 37).

The right asserted by the plaintiff in error is an incidental right of property, which is independent of the question of corporate powers or franchises.

There is an essential difference between a corporate power or franchise and an incidental right of property. A corporation has corporate powers which are granted by the charter either expressly or by implication. The general powers of a corporation include the acquisition of property necessary for its corporate business, and when property is thus acquired, certain incidental uses of that property belong to the corporation, as a vested property right, as appears from the cases which have been heretofore discussed upon this argument. These incidental property rights are to be distinguished from express or implied corporate

powers because they might belong to an individual just as well as to a corporation. If an individual owned the Fifth Avenue stages, and had the right to operate a stage line in the City of New York, the right of exterior advertising would belong to him just as we submit it belongs to the plaintiff in error.

The COURT OF APPEALS has decided that the *franchise* of the plaintiff in error (Rec., 174)

"does not expressly include the right to use the public streets mentioned therein for advertising purposes, or to carry or maintain exterior advertisements on its stages, and the carrying of such advertisements is not a necessary or essential incident to its express *franchise* rights."

We may assume this statement of law as part of our argument and still contend, that although the right asserted by the plaintiff in error may not be a part of its express or implied *corporate powers or franchise* rights, nevertheless, the right exists in the plaintiff in error as a right of property incidental to its ownership of the Fifth Avenue stages under the authority of the cases which have been cited.

The distinction between a corporate power or franchise right, and an incidental property right was clearly pointed out by Lord HALSBURY and by LINDLEY, L. J., in *Foster* v. *London, etc., Ry. Co., supra.* Had the COURT OF APPEALS recognized this distinction which we submit is sound, its decision must necessarily have been otherwise upon the question considered, apart from that of the ordinance which is treated under subsequent points.

To apply these principles to the facts of the present case, it may be observed that the charter of the Fifth Avenue Coach Company contains the grant of a legislative street franchise to operate a line of stages in the City of New York, together with express power to acquire and maintain the necessary stages, etc. Acting under the charter the company has acquired stages and operates its franchise route. The charter gives no express power to display exterior advertisements on the stages, and the New York courts have decided that such display is not a necessary incident to the company's *franchise* rights.

This may be conceded, for argument, but the question of the plaintiff's right as owner of the stages to make an innocent ancillary use of them by leasing space on them (otherwise unused and necessarily existing) remains, and this we submit is the question involved in this case.

As stated by LINDLEY, *L. J., in Foster* v. *London, etc., Railway Co.* [*supra*]:

"Any mode of enjoying a company's own land is impliedly permitted *if it is not inconsistent* with the provisions of the company's acts, and *is not an infringement of the rights of other persons.*"

The adoption by this Court of the State construction of State statutes and of State unwritten law, has no application to a right whose origin is in the individual ownership of property and not the creation of a state statute. If such a right is taken away by State laws a question of "due process" arises under the 14th

Amendment, which cannot be foreclosed by the decision of the State Courts, but remains to be decided by the SUPREME COURT of the United States. The State may, under the police power, interfere with the right, in which case it is conceded that the character of the interference may be examined by this Court, but the State Court cannot, by simply saying that no such right exists, prevent this Court from considering whether there is a right and whether it has been violated.

In the present case the COURT OF APPEALS has decided two things, [1] that a certain ordinance is valid and forbids the exterior advertising carried by plaintiff's stages, and [2] that, aside from the prohibition of the ordinance, plaintiff has no express franchise right to carry advertisements even though they injure no one and in no way interfere with its charter duties.

It must be admitted that the validity of the ordinance is open to examination in this Court, and we submit that the other point decided by the COURT OF APPEALS leaves the question whether an incidental property right of plaintiff has been taken away without due process of law, open for review by this Court.

When an intrinsically harmless, natural and ordinary use of property is forbidden by law, the owner is deprived of his property within the meaning of the constitutional provision.

The right to make use of property in every way which is not injurious to others is natural and inherent. The right is all the more obvious, when the use in question is one that is commonly exer-

cised. As Judge McCall said in his opinion in *Interborough Co.* v. *New York* (*supra*), referring to the leasing for advertising purposes of property not actually needed by railways in the exercise of their franchise, it "is practically a universal custom." The record shows, also, that a similar use is made of vacant space by the elevated and subway companies of New York City (Rec. 19 and 20).

Judge Ingraham's remarks in *People* v. *Green,* 85 App. Div. (N. Y.) 400, are most apposite. In that case the Appellate Division reversed a judgment of conviction under an ordinance prohibiting the placing of advertising signs on fences surrounding vacant lands in the vicinity of public parks in New York City. Judge Ingraham said (p. 406):

"This legislation, in my view, attempts to deprive the owner of property of his right to use it to advertise his own or another person's business, and as such takes from the owner property which cannot be taken without compensation or by due process of law."

That such an obvious, ordinary use of property, as is the renting it to advertisers, is within the protection of the constitutional provision is clearly established.

Judge Andrews in *People ex rel* v. *Otis,* 90 N. Y. 48, said (p. 52):

"Depriving an owner of property of one of its essential attributes is depriving him of his property within the constitutional provision * * *."

This principle has been repeatedly recognized by the courts of this country.

See

Pumpelly v. *Green Bay Co.*, 13 Wall. 166, 179 and authorities there cited.

Muhlker v. *Harlem Railroad Co.*, 197 U. S. 544.

Myer v. *Adam*, 63 App. Div. (N. Y.), 540, 544.

Re Grade Commissioners, 6 App. Div. (N. Y.), 327, 334.

Belleville v. Turnpike Co., 234 Ill. 428, 434.

In the *Grade Commissioners* case (*supra*) the Court said:

"Anything that affects or limits the free use and enjoyment of one's property, or of the easements or appurtenances thereto, is a deprivation or taking of property within the meaning of the Constitution."

This principle clearly applies to the present case, as the use in question not only inheres in the nature of property, but, as shown above, the plaintiff has the power to put the use to profit by allowing others to exercise it for a consideration. The attempted interference with a right incidental to the ownership of the stages is, therefore, presumptively illegal.

The doctrine of ultra vires has no application.

In behalf of the defendant it is urged that the right asserted by the plaintiff in error is *ultra*

vires, and that for this reason the action must fail regardless of the effect of the ordinance.

The doctrine of *ultra vires* applies to a case where a corporation attempts to do some act which is entirely outside of its express or implied corporate or franchise powers to the injury of its stockholders or its creditors or its creator (the State).

In its opinion the COURT OF APPEALS does not refer to the doctrine in express terms, but does hold that the right asserted is not among the express franchise rights of the plaintiff in error.

If we are correct in our position that the plaintiff's right is incidental to its ownership of the stages, the doctrine of *ultra vires* does not apply because an incidental property right may be exercised by a corporation as owner of the property to which the right appertains even though the right be not derived either from the charter of the corporation or from the terms of any franchise which it may have acquired.

We may add to the above that as a general rule a question of *ultra vires* can only be raised either by the state which granted the charter to the corporation, or by some person having a pecuniary interest.

Railroad vs. *Ellerman,* 105 U. S., 166, 173-4;

Under this rule the defendant in error has no right to raise the question.

The relation of the doctrine of *ultra vires* to the case may be stated from a different point of view.

The stages are rightfully in the streets and the City cannot remove them; this is, or must be, conceded.

They may be of any shape or design, and even if they are as ugly and clumsy as an old time freight car, no one has the right to interfere; this also must be conceded.

The screens in question may be painted any or all of the colors of the rainbow, or may display pictures which are not advertisements; this is not denied.

So far no *ultra vires* is alleged.

But the moment an innocent advertisement appears, which harms no one, does not interfere with the operation of a stage, and in no way affects the public duty of the corporation, it is said that an *ultra vires* act has been committed, the only new feature of the situation being the fact that the advertisement is paid for.

If, now, there were no ordinance, could it be contended for a moment that the corporation had usurped a franchise or gone beyond its common law property rights? Nothing has been done except to sell something which belongs to the corporation and for which it has no use so profitable.

The effect of the ordinance is considered elsewhere, but we contend here that the doctrine of *ultra vires* has no possible application to the case. When the COURT OF APPEALS refers, in its opinion, to the lack of an express franchise right to advertise, it does so merely to indicate that such a right is *necessary to overcome the authority of the ordinance,* and it nowhere declares that the absence of the right, *in itself,* is sufficient to defeat the action.

The answer of the defendant (Rec. 9-12), does not set up *ultra vires* as a defense. All that

is alleged is that there has been a violation of the ordinance, which "constitutes an unauthorized use of the streets," and is "a nuisance."

Under the rules of pleading *ultra vires* is an affirmative defence which must be pleaded.

See

Richmond Co. Soc. P. C. C. v. *City of New York*, 73 App. Div., 607.

In short, the only substantial defence alleged by defendant and recognized by the COURT OF APPEALS, is the prohibition of the ordinance.

SECOND POINT.

The ordinance in question as construed by the Court of Appeals of the State of New York, is an unlawful exercise of an assumed police power which operates to deprive the plaintiff in error of its property without due process of law and in contravention of the Fourteenth Amendment of the Federal Constitution.

This point was raised by exception 24 (Rec. 33), to the refusal of the Trial Court to find plaintiff's Eighth Proposed Conclusion of Law, which was as follows (Rec. 31):

"(8) Any law or ordinance which prevents the Fifth Avenue Coach Company, the plaintiff herein, from displaying advertisements on the exterior of its vehicles, will deprive it of its property without due process of law. (Refused, D. L., J.)"

(Assignment of Errors, Nos. (3)—(6), Rec. 164-165.)

The plaintiff in error contends, (1) that the owner of property has a natural inherent right to use it in any way which is not injurious to other persons; (2) that plaintiff, as owner of the Fifth Avenue stages, has the right to lease space to be used for the display of advertisements, unless such display works an injury to passengers or the public; (3) that the judicial findings in the case (heretofore quoted) negative every species of injury which can possibly result to passengers or the public from such use, or be a proper sub-

ject for the exercise of police power by the municipality or legislature.

The question is thus distinctly presented, whether a common carrier of passengers can be lawfully deprived of the incidental right to increase its income by leasing space on the exterior of screens, forming a necessary structural part of its stages, for the exhibition of advertisements which in no way affect the welfare, comfort, safety, health, convenience or morals of passengers or of the public.

The Trial Court found, as set forth in our "Statement" above that (Rec. 22, 30 and 31):

"First. The advertisements in question are not a nuisance. * * *

Fourth. The health, physical comfort, safety and morals of passengers and public are not injured by the display of the exterior advertisements which have appeared on the plaintiff's stages."

These findings though found as conclusions of law are essentially findings of fact.

The Trial Court also found, as shown above, among its findings of fact (Rec. 20):

"Thirty-second. The advertising signs displayed on the stages of the Fifth Avenue Coach Company, the plaintiff herein, have no relation to the physical comfort, health or convenience of the passengers or public, or the operation of the stages."

The Court of Appeals in its opinion (Rec. 177), suggested that the general display of advertisements on the exterior of wagons engaged in their

usual business, and not devoted exclusively to advertising purposes, might make such wagons a parade or show which would tend to produce congestion upon the streets where they were driven.

This point was not made by counsel for the City at any stage of the case, either upon the trial, or before the APPELLATE DIVISION, or on the argument in the COURT OF APPEALS, and no evidence whatever was introduced to support it. The Trial Court neither made nor was asked to make such finding. All the evidence taken and proceedings had upon the trial are contained in the Record. This appears from the certificate of the parties (Rec. 118), which excludes the possibility of omission.

The reasonableness of the ordinance is to be determined from the evidence contained in the Record and from the findings based thereon which sustain unqualifiedly the contention of the plaintiff in error.

Egan v. *Hart*, 165 U. S., 188, 189.
Stanley v. *Schwalby*, 162 U. S., 255, 278.
Bement v. *Nat. Harrow Co.*, 186 U. S., 71, 83.
Waters Pierce Oil Co. v. *Texas*, 212 U. S., 86, 97.

The opinion of the COURT OF APPEALS will not be considered by this Court—

"for the purpose of ascertaining the evidence or the facts found below, upon which the judgment was based,"

Loeb v. *Col. Township Trustees*, 179 U. S., 472; 482-3.

The judgment appealed from, that is to say, the decision of the court upon the basis of which the judgment was rendered, contains express findings as quoted above, which not only do not support, but on the contrary, contradict the intimation of the COURT OF APPEALS, since the supposed "congestion" spoken of in the opinion of that court would be a "nuisance," (New York Penal Code, § 385, subdivision 3, quoted hereafter on page 51), dangerous to the public, whereas, the express finding is, that the display of advertisements in question is not a nuisance, and is in no way injurious to the public. Moreover, the assumption of the COURT OF APPEALS describes a purely imaginary condition which has never been known to occur, and which could not have been contemplated by the authors of the ordinance.

It is conceivable that advertisements might be devised which would tend to produce a dangerous congestion; it cannot be argued that *all* advertisements would have this tendency. But the ordinance is sweeping, and, instead of *regulating* the subject by forbidding an objectionable display, every species of advertising on wagons is prohibited, except "business notices" on "ordinary business wagons."

The obvious fact is, that the action of the City was inspired by an opinion that the advertisements in question were offensive to good taste, and not by any apprehension of congestion or other public danger. This appears from the record, since every other possible motive for the interference of the City officials is eliminated by the evidence and the findings.

The unreasonable character of the ordinance appears further from the scope of its provisions, as construed by the Court of Appeals.

Judge CHASE, in the course of the opinion of that court, says (Rec. 174):

"General advertising for hire is by the ordinance prohibited, whether carried on wagons wholly used for advertising or in connection with the ordinary or usual business in which the wagons are engaged."

It is true the opinion does not go as far as this observation implies in other parts, but upon the whole it seems to us a fair interpretation of what was meant.

This construction makes the ordinance prohibit advertisements *for hire* wherever they may be exhibited on vehicles. Any vehicle, therefore, carrying advertisements *for hire,* whether outside or inside the vehicle, is an advertising wagon under the ordinance, as construed by the COURT OF APPEALS.

Evidently, then, the advertising which the plaintiff is at present carrying in the interior of its stages, under the contract made by it with the Railway Advertising Company, dated May 15, 1905 (Rec. 113), is within the prohibition of this ordinance.

For the same reason, the display of advertisements for hire in the interior of elevated railway cars and surface railway cars in the Borough of Manhattan, makes these vehicles advertising wagons within the meaning of the ordinance.

The above language of the COURT OF APPEALS, if we understand it correctly, applies equally to interior and exterior advertising.

This Court is not bound by the determination of the State Courts either as to the lawfulness of the ordinance or as to its effect upon the rights of the plaintiff in error.

It may examine the ordinance and place its own independent construction thereon, because the determination of the question whether the proceedings in this case under that ordinance deprive the plaintiff of its property necessarily involves the meaning of the ordinance, and whether the enforcement thereof is in conflict with the constitution and laws of the United States.

Yick Wo v. *Hopkins*, 118 U. S., 356, at p. 366;

In that case this court differed from the Supreme Court of California upon the real meaning of the ordinances in question in that case. The Supreme Court of California put one construction upon those ordinances and this court adopted a very different construction.

See also

Dobbins v. *Los Angeles*, 195 U. S., 223.

A municipal ordinance which prohibits the exercise of a property right which is not a nuisance, and which in no way affects the well-being, health, physical comfort, convenience, safety or morals of the community is, to the extent of such prohibition, unlawful under the fourteenth amendment to the constitution of the United States.

This proposition involves an examination of the subject of "police power."

The ordinance in question was enacted by the Board of Aldermen as already stated under the power granted in the New York City Charter (Sections 43, 44 and 50, Chap. 466, L. 1901), to make ordinances which

"they may deem necessary and proper for the good government, order and protection of persons and property, and for the preservation of the public health, peace and prosperity of said city and its inhabitants," and

"to *regulate* the exhibition of advertisements" in the streets of the City.

This language describes what is commonly meant by the term, "police power."

The police power has marked limitations. In most cases the power is exercised to modify, regulate, control or forbid some particular method of using property, which interferes with the well-being of society. In the present case, the New York ordinance, as construed by the COURT OF APPEALS, forbids the exposing of advertisements on the exterior of plaintiff's stages as well as upon the wagons of all others, whether corporation or individual.

This Court has approved and adopted certain limits upon the police power which preclude a claim of lawfulness of the ordinance in question.

In the *Yick Wo* case, *supra*, this Court, speaking of the *quasi* legislative acts of municipal bodies said that at common law, regulations adopted by

such bodies must be reasonable, not inconsistent with the charter, nor with any statute or general principle of the common law, particularly those having relation to the liberty of the subject or the rights of private property.

While the extent and limits of what is known as the police power cannot be explicity defined, as said by Mr. Justice BROWN, in *Lawton* v. *Steele*, 152 U. S., 133, at page 136:

"It is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance."

In this case the court refers to various cases in which so-called police regulations had been declared illegal, among others, to the case of *Rockwell* v. *Nearing*, 35 N. Y., 302, in which an act of the legislature of New York authorizing the seizure and sale without judicial process of all animals found trespassing within private enclosures was held to be a deprivation of the owners' property without due process of law, and says, at page 138 (152 U. S., *supra*):

"In all these cases the acts were held to be invalid as involving an unnecessary invasion of the rights of property, and a practical inhibition of certain occupations harmless in themselves, and which might be carried on without detriment to the public interests."

In the case of *Dobbins* v. *Los Angeles*, 195 U. S., 223, Mr. Justice DAY used the following language (pp. 235-6, italics ours):

"It may be admitted that every intendment is to be made in favor of the lawfulness of the exercise of municipal power, making regulations to promote the public health and safety, and that it is not the province of courts, except in clear cases, to interfere with the exercise of the power reposed by law in municipal corporations for the protection of local rights and the health and welfare of the people in the community. But notwithstanding this general rule of the law, it is now thoroughly well settled by decisions of this court that municipal by-laws and ordinances, and even legislative enactments undertaking to regulate useful business enterprises, are subject to investigation in the courts with a view to determining whether the law or ordinance is a lawful exercise of the police power, or *whether under the guise of enforcing police regulations* there has been an unwarranted and arbitrary interference with the *constitutional rights to carry on a lawful business, to make contracts, or to use and enjoy property.*"

The general limit of what is considered to be the police power of a state is clearly stated by Mr. Justice HARLAN in

Mugler v. *Kansas*, 123 U. S., 623, 661, viz.:

"If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the Courts to so adjudge, and thereby give effect to the Constitution."

Further on in the same case, speaking of the claimed limitation of the Federal Constitution upon the police powers of the States, the following is stated (p. 663):

"But neither the Amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity."

Again, in the same case it is said to be a fact (p. 662):

"within the knowledge of all, that the public health, the public morals and the public safety, may be endangered by the general use of intoxicating drinks,"

and that it is a fact

"established by statistics accessible to every one, that the idleness, disorder, pauperism and crime existing in the country, are, in some degree at least, traceable to this evil."

These facts, judicially noticed, made it unnecessary to offer evidence showing the dangers of the liquor traffic.

But in the present case, it is *not* a fact "*within the knowledge of all,*" *nor* is it "*established by statistics,*" that advertisements on a passenger stage, or elsewhere, work any injury to the community. There is no presumption against them, and to prohibit them under the police power, competent evidence of their objectionable character or effect should be produced.

If there be any presumption it is to the contrary. The omnipresence of advertisements upon private

property adjacent to highways along the principal thoroughfares of our large cities and trunk lines of railroads in or adjacent to every great city and even small ones bears forceful testimony to this effect.

The case of Yates v. Milwaukee, 10 Wall. 497, furnishes the true rule applicable to the present case.

An act of the Wisconsin legislature authorized the City of Milwaukee:

"By ordinance to * * * restrain and prevent encroachments"

upon two rivers running through the town, and

"obstructions thereto."

A riparian owner had built a dock out to deep water in one of the rivers. Assuming authority under the act of the legislature, the City passed an ordinance which declared the dock to be an obstruction to navigation and a nuisance, and ordered it abated. Thereupon the owner of the dock filed a bill for an injunction in the United States Circuit Court. The bill was dismissed, and an appeal was taken to this Court, where the decree was reversed, and an injunction granted.

There was no evidence to show that the wharf was an actual obstruction to navigation, or was in any other sense a nuisance.

This Court said (p. 505, italics ours) that:

"the *mere declaration* by the *city council* of Milwaukee that a certain structure was an encroachment or obstruction, *did not make it so, nor could such declaration make it a nuisance, unless it in fact had that character,*"

and that the ordinance declaring the wharf a nuisance was

"the only evidence in the record that it is a nuisance or an obstruction to navigation, or in any manner injurious to the public."

We understand the principle underlying this decision to be that an act which is harmless in itself, and which the common law recognizes as legal, does not become a nuisance upon the mere assertion to that effect, contained in a municipal ordinance. There must be evidence of probative facts, unless, as in the *Mugler Case,* the facts are such that the Court will take judicial notice of them. Yates's wharf was no nuisance at common law, and proof that it had acquired that character was necessary for its condemnation, notwithstanding the ordinance.

So at common law, it was lawful to "hawk and peddle" merchandise in the highways (*Stamford* v. *Fisher*, 140 N. Y., 187), a practice which included "advertising wagons," as one method of hawking or advertising. This privilege was, of course, subject to municipal regulation, but as declared by the New York Court of Appeals at page 191, in the case last cited, such regulation, being in *"restriction of the common law,"* must be strictly construed.

In the same case Judge GRAY said further (p. 191, our italics):

"I would not hold that such a statute is not to receive an equitable, as well as a strict construction; for it is in purpose beneficial to the community where it is to receive its operation. *But its operation should be confined* to those cases where it is *plainly discoverable* that the *mischief exists,* for which the law was intended to provide a remedy, and where the *need is evidenced* for the extension of the protection intended by the legislature."

It is clear from the above that an ordinance which excludes *all* advertising wagons from the streets, must be supported by proofs that such wagons have become objectionable.

Applying these principles to the case at bar, it appears that the New York ordinance against advertising wagons forbids the exercise of a common law right, and yet is not supported by evidence that such exercise is injurious to the public. There is nothing to show that the presence of advertising wagons in the street is one of those evils which ought to be corrected by the police power, and even the ordinance itself does not declare that the wagons produce any mischievous results. On the contrary, the findings of the Court in this case declare the harmless character of the advertisements, the display of which transforms plaintiff's stages into advertising wagons.

The only theory on which the validity of the ordinance can be sustained is, that the mere fact of the exclusion of certain vehicles from the streets by ordinance, is presumptive proof that they are a nuisance, or in other words that the ordinance proves itself.

This doctrine is negatived by the case of *Yates* v. *Milwaukee* (*supra*).

The principles stated by the Supreme Court have been followed in numerous well considered cases in the state courts which unite in holding that when an intrinsically harmless use of private property is prohibited by law, it must appear clearly that the prohibition accomplishes some purpose which is of benefit to the community.

This rule runs through all the cases where the police power has been judicially sustained.

In the words of the New York charter (Sec. 43), such prohibition must be necessary and proper for the

"good government, order and protection of persons and property and * * * the public health, peace and prosperity of said city and its inhabitants."

The prohibited use of property by the owner must in some way endanger the well being, health, safety, convenience or comfort of other people, or must be of an immoral tendency. If the act prohibited has none of these features we submit that the prohibition is unconstitutional, as interfering with the rights of private property.

In *Fisher Co.* v. *Woods*, 187 N. Y., 90, Judge HAIGHT said (p. 94, our italics):

"The constitutionality of this act depends upon the question whether it was a valid exercise, on the part of the legislature, of the police powers

of the state. The rules which should control us in the determination of this question appear to be well established by the authorities. The power must be exercised subject to the provisions of both the Federal and State Constitutions, and the laws passed in the exercise of such power must tend, in a degree that is *perceptible and clear,* toward the preservation of the public safety, or the lives, health and morals of our inhabitants or the welfare of the community."

In the case just cited, a New York statute had made it a misdemeanor to offer real property for sale without the written authority of the owner. The COURT OF APPEALS held that the law was an improper and unreasonable exercise of the police power of the State, and a violation of the Federal and State Constitutions, as being an arbitrary infringement of the liberty and rights of all persons who should engage in selling real estate for others.

Judge HAIGHT said further (p. 94):

"To justify the state in interposing its authority in behalf of the public, it must appear that the interests of the public generally, as distinguished from those of a particular class, require such interference and that the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interest, arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations. * * * Liberty, in its broad sense, means the right not only of freedom from servitude, imprisonment or restraint, but the right of one to use his faculties in all lawful ways; to live and work where he will, to earn his livelihood in any lawful calling and to pursue any lawful trade or avocation."

On page 97 Judge HAIGHT said (italic ours):

"It [the law in question] is an arbitrary infringement upon the liberty and rights of all persons who choose to engage in such occupation. Had the act been for the purpose of *regulating* the business of brokerage, or a statute of frauds, a different question would have been presented, but it is neither. It relates, as we have seen, to any and every person, and instead of making the oral contract void, it makes the person employed guilty of a misdemeanor and punishable as a criminal."

In *Matter of Jacobs*, 98 N. Y., 98, the COURT OF APPEALS held that the act entitled,

"An Act to improve the public health, by prohibiting the manufacture of cigars and preparation of tobacco in any form in tenement-houses, in certain cases,"

was unconstitutional.

In the course of the opinion, Judge EARL discussed the subject of the police power. On page 108, he said (italics ours):

"That power (police power) is very broad and comprehensive, and is exercised to promote the *health, comfort, safety* and *welfare of society.* * * * Under it the conduct of an individual and the *use of property* may be *regulated* so as to interfere, to some extent, with the freedom of the one and the enjoyment of the other; and in cases of great emergency engendering overruling necessity, property may be taken or destroyed without compensation, and without what is commonly called due process of law. The limit of the power cannot be accurately defined, and the courts have not been able or willing definitely to circumscribe it.

But the power, however broad and extensive, *is not above the Constitution.*"

He said again (p. 110, italics ours):

"Under the mere guise of police regulations, personal rights and private property cannot be *arbitrarily invaded,* and the determination of the legislature is not final or conclusive. If it passes an act ostensibly for the public health, and thereby destroys or takes away the property of a citizen, or interferes with his personal liberty, then it is for the courts to scrutinize the act and see whether it *really relates to* and is convenient and appropriate to promote the *public health.* It matters not that the legislature may in the title to the act, or in its body, declare that it is intended for the improvement of the public health. Such a declaration does not conclude the courts, and they must yet determine the fact declared and enforce the supreme law."

Again (p. 115, italics ours):

"When the health law is challenged in the courts as unconstitutional on the ground that it arbitrarily interferes with personal liberty and private property without due process of law, the *courts must be able to see that* it has at least *in fact some relation to the public health,* that the *public health is the end actually aimed at,* and that it is *appropriate and adapted to that end.*"

In *People* v. *Gillson,* 109 N. Y., 389, a law prohibiting the sale of any article of food upon the inducement of a gift, prize or premium to the purchaser, was held to be unconstitutional and not valid as a proper exercise of the police power of the state.

The opinion of the court, by Judge PECKHAM, contains a full discussion of the limitations of the

police power, with citation of authorities. The counsel for the appellant had argued that the act was one in furtherance of the policy of the state prohibiting lotteries, but the court said there was *nothing in the act referring to lotteries* and *nothing in the record* to show that the transaction upon which the defendant was convicted *was in any sense a lottery.* It was also argued that the act was valid as a health law; as a regulation to prevent the sale of impure, unhealthful and adulterated food. The court answered this argument by saying that to bring the case within this principle there must be *some adaptation of means to an end which the courts can see and admit the force of.*

A case very close to the facts of the present case is *People* v. *Armstrong,* 73 Mich., 288, where the defendant, in violation of an ordinance of the city of Detroit, distributed circulars in one of the public streets of that city. The defendant's conviction was reversed, and the law was held to be unconstitutional and not within the police power. The Court said (pp. 294-295, italics ours):

"*Yet the reasonableness or unreasonableness of an ordinance is not determined by the enormity of some offense it seeks to prevent and punish, but by its actual operation in all cases that may be brought thereunder.* It is conceded in the present case that these cards were given to those only who expressed, or appeared to express a desire for the same, and that no cards were to be seen upon the ground or sidewalk, at or near the place where the defendant was distributing them; *and it is not pretended that the rights of any person were interfered with by defendant, or that any teams or horses were frightened.*

* * * * * * *

Laws which attempt to regulate and restrain our conduct in matters of mere indifference, without any good end in view, are regulations destructive of liberty. Under our Constitution and system of government the object and aim is to leave the subject entire master of its own conduct, except in the points wherein the public good requires some direction or restraint."

The ordinance thus held beyond the police power was as follows:

"Sec. 12. * * * And no person shall himself or by another circulate, distribute or give away circulars, hand bills, or advertising cards of any description in or upon any of the public streets and alleys of said city."

It will be observed that the Supreme Court of Michigan held that the true test of the ordinance was its

"*actual operation* in *all* cases that may be brought thereunder."

In the case before it, the evidence showed that the defendant Armstrong, while clearly disobeying the ordinance, had done nothing which could be deemed a nuisance or an interference with the right of others. This is precisely the plaintiff's case.

People v. *Rochester*, 44 Hun, 166 (N. Y.), resembles the Michigan case. Members of the Salvation Army were arrested and fined for parading and singing on Sunday afternoon. The General Term of the SUPREME COURT held that the conviction was contrary to law. The court said, (p. 169, italics ours):

"The provisions of the charter, in pursuance of which the ordinance was enacted, are designed to prevent public disorder and disturbance. The same clause which gives power to the Common Council 'to *prevent* disturbing noises in the streets' impliedly withholds the power to *prevent* 'the ringing of bells and the *crying of goods for sale* at auction' in the streets by giving authority merely to '*regulate*' them. *Unless the practice is permitted* there is nothing to regulate. * * *

Their singing and display of the flag were simply the means they ordinarily used to attract attention and procure followers to their quarters, and we do not think the use of those means can be said, under the circumstances, to have amounted to a disturbance of the public peace, within the meaning of the ordinance and the charter. Like means used by showmen, exhibitors and vendors of wares, under ordinary circumstances, to attract public attention, would hardly be regarded as infractions of the ordinance."

The display of advertisements made by the advertising company under contract with the plaintiff, or the lease of space by the latter to the former, is not a nuisance and in no way injures or affects the welfare, health, physical comfort, safety, convenience or morals of passengers, or of the public.

This proposition is supported by the findings of the Trial Court (Rec. 20, 22 and 31) already quoted in our "statement."

It is also supported by the authorities.

Upon the subject of Nuisance the Penal Code of New York contains, in Section 385, an authoritative definition as follows:

"§ 385. 'PUBLIC NUISANCE' DEFINED.

A public nuisance is a crime against the order and economy of the State, and consists in unlaw-

fully doing an act, or omitting to perform a duty, which act or omission:

1. Annoys, injures, or endangers the comfort, repose, health or safety of any considerable number of persons; or

2. Offends public decency; or

3. Unlawfully interferes with, obstructs or *tends to obstruct,* or renders dangerous for passage, a lake or a navigable river, bay, stream, canal or basin, or a stream, creek, or other body of water which has been dredged or cleared at public expense, or a public park, square, *street* or *highway;* or

4. In any way renders a considerable number of persons insecure in life, or the use of property."

It cannot be contended for a moment that the advertisements in question in this case are within the terms of this section.

The word "nuisance" is also defined in the City Charter of New York, as follows:

"§ 1229. The word nuisance, as used in this act, shall be held to embrace public nuisances, as known at common law, or in equity jurisprudence; and it is further enacted that whatever is dangerous to human life or detrimental to health; whatever building or erection, or part or cellar thereof, is overcrowded with occupants, or is not provided with adequate ingress and egress to and from the same, or the apartments thereof, or is not sufficiently supported, ventilated, sewered, drained, cleaned or lighted, in reference to their or its intended or actual use; and whatever renders the air, or human food or drink, unwholesome, are also, severally in contemplation of this act, nuisances; and all such nuisances are hereby declared illegal; and each and all persons and corporations who created or contributed thereto, or who may support, continue or maintain or retain them, or

any of them, shall be jointly and severally liable for, or toward, the expense of the abatement and remedying of the same; but as between themselves, any such persons and corporations, may enforce contribution or collect expenses, according to any legal or equitable relations existing between them; but nothing herein contained shall annul or defeat any common law liability or responsibility in respect of nuisance. Whenever the words 'place, matter or thing,' or either two of said words, are used in this act, or in titles one, four and five of this chapter, they shall, unless the sense plainly requires a different construction, be construed to include whatever is embraced in the enumeration with which they are connected."

A mere inspection of this section shows that it has absolutely no application to the advertisements in question in this case.

The general rule is stated in *Wood on Nuisances*, 3d Edition, Sec. 801, at page 1177, where the author says (italics ours):

"In all cases, in order to warrant an injunction for a nuisance resulting from noise, smoke, noisome smells, etc., where there is no serious injury to property, but the application for the injunction is predicated upon the discomfort produced thereby, *the discomfort must be shown to be physical, and not such as depends on taste or imagination. It must be offensive physically to the senses, and by such offensiveness as makes life uncomfortable.*"

The advertisements in question cannot be judicially condemned on aesthetic grounds.

This was the finding of the Trial Court. The remarks of Mr. Justice Holmes, in

Bleistein v. *Donaldson Lithographing Company*, 188 U. S. 239, at p. 251,

are pertinent on this point.

Another case which deals with the question of good taste in advertising, is

Commonwealth v. *Boston Advertising Company*, 188 Mass., 348 [1905].

The Court, per BARKER, *J.*, said (p. 352, italics ours):

"The plain and intended purpose of the rule is to prohibit the use of land near public parks and parkways for advertising. This has come to be an ordinary and remunerative use of lands near largely traveled streets, parkways, public parks, railroads, and other places frequented in numbers by the public. It is as natural a use of such lands as is the use of store fronts and show windows for the display of goods kept for sale, or for other modes of advertising. It resembles the placing of advertising pages on each side of the literary portion of a periodical, or the *placing in street cars or railway stations* of advertisements disconnected with the business of transportation. *All these at present are usual, common and profitable uses of property of which every one sees daily numerous instances.*

In the opinion of a majority of the court, the rules or regulations established by the commission so interfere with this use of property as to amount to a taking of property for public use, and as no compensation is provided for, the rules are void, because obnoxious to the provisions of our Constitution."

Even a stronger case is

> *Passaic* v. *Paterson, etc., Advertising Co.*, 72 New Jersey, L. R. 285 (Court of Errors and Appeals, New Jersey, 1905),

which held (reversing the Supreme Court), that a City ordinance requiring that signs or billboards should be placed not less than ten feet from the street line, is a regulation not reasonably necessary for the public safety, and cannot be justified as an exercise of the "police power." The opinion of the Court was by Judge SWAYZE. On page 287 he said (italics ours):

"We think the control attempted to be exercised is in excess of that *essential to effect the security of the public*. It is probable that the enactment of Section 1 of the ordinance was due rather to *aesthetic considerations* than to considerations of the public safety. No case has been cited, nor are we aware of any case which holds that a man may be deprived of his property because his tastes are not those of his neighbors. *Aesthetic considerations are a matter of luxury and indulgence, rather than of necessity, and it is necessity alone which justifies the exercise of the 'police power' to take private property without compensation.*"

The Supreme Court of New Jersey had said that because the erection of the bill-boards *might* become dangerous to the public in case of severe storms or by decay of the supports, the ordinance was justified, but the Court of Errors and Appeals held that the *mere possibility* of danger was not sufficient to justify depriving an owner of the ordinary use of his property.

See also

Bryan v. *City of Chester*, 212 Pa., 259, 262.

The ordinance cannot be sustained as a police regulation covering the use of the streets.

The Board of Aldermen has the power to enact an ordinance for this purpose, and the COURT OF APPEALS intimates that this is a ground for the application of the ordinance to the plaintiff in error (Rec., p. 175). It says that the advertising *for hire* under the contract with the Advertising Company clearly tends to increase the number of stages. The natural and only conclusion from this is that the Court had in mind that the stages may be increased in number to such an extent as to require regulation by ordinance. But the Court clearly fails to give weight to the fact that the stages of plaintiff in error are on the streets and avenues in question for the carriage of passengers and property for hire, by express grant from the legislature of the State of New York. There is no limitation upon the number of stages which may be employed—there is no finding that the stages, either with or without the advertisements in question, have interfered with other traffic or other rights of said streets and avenues. But even this power would be one to regulate, not to prohibit.

THIRD POINT.

The ordinance denies to plaintiff in error the equal protection of the laws, within the meaning of the Fourteenth Amendment of the Constitution of the United States.

This point was raised by exception 24 to refusal of the Court to charge plaintiff's Ninth Proposed Conclusion of Law (Rec. 33), which was as follows (Rec., 31):

"(9) Any law or ordinance which prevents the Fifth Avenue Coach Company, the plaintiff herein, from displaying advertisements on the exterior of its vehicles will contravene the Constitution of the United States, and will also deprive the plaintiff herein of the equal protection of the laws within the meaning of the Fourteenth Amendment.

(*Refused, D. L., J.*)"

(Assignment of Errors No. (8) Rec. 167.)

The ordinance is a sweeping prohibition, qualified by an exception, which is in effect an arbitrary selection in the guise of a classification.

No advertising wagons are allowed in the streets, but "*ordinary business wagons*" when "*engaged in the usual business or work of the owner*, and not used *merely or mainly for advertising*," are permitted to exhibit "business notices."

The ordinance thus creates a favored sub-class of vehicles which are permitted to display advertisements, it being self-evident that the term "business notices" includes "advertisements."

The classification demands three elements, viz.; [1] the vehicle must be an "ordinary business wagon"; [2] must be engaged in the "usual business or work of the owner"; and [3] must not be used "merely or mainly for advertising."

Vehicles having these three characteristics may display advertisements; others may not.

The Fifth Avenue stages, when they carried the advertisements objected to, were engaged in the usual business of their owner, viz: that of a common carrier of passengers, and they were not then or at any time used merely or mainly for advertising. Thus they possessed two elements of the privileged sub-class, but as they cannot pretend to be "ordinary business wagons," they are deprived of the benefit of the exception contained in the ordinance.

If ordinary business wagons may carry advertisements upon complying with required conditions, why should passenger stages be denied the same privilege? Mere classification is not sufficient to save an ordinance from the condemnation of the equality clause of the Fourteenth Amendment; the classification must be based

"upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection."

This was the language of the Court in

Gulf, Etc. Co. v. Ellis, 165 U. S. 150, at page 165,

where a Texas Statute, which permitted an attorney's fee not exceeding ten dollars to be taxed

against railroad corporations in certain actions, was held to be a denial of the equal protection of the law, because individual citizens and other corporations were not required to pay attorneys' fees under similar circumstances.

Plaintiff's stages and "ordinary business wagons," both belong to the general class of vehicles using the highways for business purposes, and it is difficult to see upon what just ground the latter are thrown into a favored sub-class with privileges which are denied to the former. The object of the ordinance being to prevent the exhibition of advertisements on vehicles, why is one kind of vehicle permitted to exhibit advertisements and not another? This seems to be a clear case of unfair discrimination. If the advertisements when exposed on one type of vehicle are an injury to the public, they are equally an injury when they appear on a different type. If the advertisements objected to in this case harm the public, they are harmful, whether displayed on an ordinary business wagon or on a passenger stage. If the supposed evil to be remedied by the ordinance is congestion in the streets, as intimated by the COURT OF APPEALS, the evil is the same no matter on what vehicle the advertisement is displayed, and no good reason can be suggested for discriminating in favor of one type as against the other. That there is a discrimination cannot be denied.

The fact is, as already stated, that the interference of the City with plaintiff's stages, was inspired by the idea that the advertisements in question were an offense to good taste, and the existing ordinance was resorted to as the most convenient hostile weapon at hand, though to

make it applicable to the case a forced construction had to be put upon its language. The COURT OF APPEALS recognizes the real motive of the interference when, in their opinion, they describe the plaintiff's advertisements as "an *exaggerated* and *gaudy* display" (Rec., 177). The fact appears also from the elaborate description contained in the findings of the Trial Court, showing in detail not only the composition of the advertisements, but the very coloring of the composition. Substantially all of pages 14, 15, 16 and 17 of the Record is devoted to these findings. The advertisements being harmless in character, and having been expressly found to be so, there was no reason for this minute description, except to show the "garish" and unaesthetical character of the advertisements.

It will be argued, that the words "*business notices,*" used in the ordinance, refer only to advertisements of the business of the owner of an "*ordinary business wagon,*" the supposed intention being that an "*ordinary business wagon*" may carry advertisements of its owner's business, and those only. This is not the sense of the language used in the ordinance, and only by doing violence to the plain meaning of words, or by injecting into the ordinance an idea which is not there, can this construction be defended. Nothing can be plainer than the meaning of the ordinance. It presents a contrast between "*advertising wagons,*" on the one hand, and "*ordinary business wagons*" on the other. The former are prohibited; the latter, upon complying with certain conditions, are allowed to display "*business notices,*" but no limitation, qualification or description of the "*business no-*

tices" thus permitted is contained in the ordinance. The phrase is perfectly general. There is thus a clear express permission to the owner of an "ordinary business wagon," to display any business notice on such wagon, whether it relates to his own business or not, provided the wagon is engaged in the usual business of the owner, and is not used merely or mainly for advertising. Thus a baker's wagon, engaged in delivering bread to customers, may carry the advertisement for "Durham's Smoking Tobacco," which wounded the susceptibilities of the City officials. There is nothing in the ordinance to indicate that the business notices which business wagons are allowed to carry are restricted to the business of the owner, and to put this construction upon the ordinance is in effect to make a new ordinance. It is a familiar and fundamental canon of construction that what is perfectly plain needs no construction.

If, however, for the sake of argument, it be assumed that the words *"business notices"* refer exclusively to the business of the owner of the wagon, as the COURT OF APPEALS seems to hold (Rec., 174, 177), the unfair discrimination of the ordinance becomes even more striking, because upon that construction only *"ordinary business wagons"* have the right to advertise the owner's business, and a passenger stage, which is not an ordinary business wagon, has no such right. Upon this construction of the ordinance, the Fifth Avenue Coach Company and all similar corporations, have no right to exhibit notices relating to their business, and that privilege would be exclusively reserved to *"ordinary business wagons."* If this be the true meaning of the ordinance, the Fifth

Avenue Coach Company and all similar corporations are deprived of a privilege, which is granted to the owners of another class of vehicles, without any adequate reason for the discrimination.

There is still another instance of unfair discrimination, resulting from the operation of the ordinance.

The ordinance discriminates between two classes of passenger carriers having chartered rights to use the streets.

The thirtieth finding of fact of the Trial Court was as follows (Rec., 19, italics ours):

"Advertising signs in various colors *visible from the sidewalk,* are now and have been for *twenty years* last past displayed and maintained on the stairs of the elevated railway companies which stand *in the streets* of the City of New York. Said advertisements extend from the top to the bottom of said stairways, on the back thereof and also on the risers of the steps. *Large signs are also displayed at the foot of the staircases.* Soaps, *tobacco,* theatrical performances, etc., are advertised. Advertising signs are also displayed on the elevated structures in the City of New York, which extend along the inside of the railings of the station platforms and on the risers of the platforms adjoining the tracks, and are *visible in some cases from the street.* Upwards of 775,000 people use the elevated railways and their respective stations daily."

The extent to which the elevated railway companies have utilized their stations and structures for advertising purposes, is familiar to everyone. These stations and structures stand altogether

within the boundaries of the streets, but the charters of the companies it will be conceded, and as appears from a case cited by Defendant in the COURT OF APPEALS (*Pears* v. *Manhattan Ry. Co.*, N. Y. Com. Pleas, Nov., 1899) give them no right to take advantage of their situation for advertising purposes. It results that the City permits the railway companies to use the streets for advertising purposes, but denies plaintiff the same privilege. The congestion in the streets, supposed to be prevented by the ordinance, is just as necessarily to be produced in the neighborhood of the elevated stations by the advertisements there exhibited, some of which, as found by the Trial Court, (Rec. 19-20) and, as is a matter of common knowledge, are visible from the streets. We have then the case of two classes of passenger carriers having chartered rights to use the streets in their business, one class allowed to exhibit advertisements as an incidental use of their property and the other not; the permitted use in one case being open to the same objection which is urged as a reason for denying the use in the other. We assume that elevated railway companies are in the "*same business*" with plaintiff in error, within the meaning of the rule laid down in

Soon Hing v. *Crowley*, 113 U. S. at page 709.

We submit respectfully that the above facts constitute a denial of the equal protection of the laws.

FOURTH POINT.

The ordinance impairs the obligations of the contract between the plaintiff and the Railway Advertising Company, and of the contract subsisting between the State of New York and the plaintiff.

This point was raised by exception 24 (Rec. 33), to the refusal of the Trial Court to find plaintiff's Tenth Proposed Conclusion of Law, which was as follows (Rec. 31):

"(10) Any law or ordinance which prevents the Fifth Avenue Coach Company, the plaintiff herein, from displaying advertisements on the exterior of its vehicles, will impair the obligation of the plaintiff's contracts with the Railway Advertising Company, as well as of its contract with the State. (Refused. D. L., J.)."

(Assignment of Errors No. (7) sub. div. (*d*) & (*e*), Rec. 166-167).

The ordinance impairs the obligation of the contract between the plaintiff in error and the Railway Advertising Company.

Whether or not such a contract exists in point of fact is a matter which this Court will determine for itself, notwithstanding the construction of the highest Court of New York passing upon a Municipal Ordinance adopted by authority of the State.

Delmas vs. *U. S. Insurance Company*, 81 U. S., 661-668.

We have argued under the First and Second Points that the plaintiff has the right to rent vacant spaces for advertising purposes on its stages, as a right incidental to the ownership of its stages, beyond the reach of the attempted exercise of the police power. The plaintiff exercised this right by entering into two contracts with the Railway Advertising Company, one on May 15, 1905, and the other on May 11, 1907. The contract of May 15, 1905, leased the space for interior advertising chiefly, but included the right to use space on the exterior of the coaches for the display of (Rec. 41, 114),

"four flags or signs for the purpose of advertising or displaying thereon announcements of events of public interest or amusement, calculated to attract passenger travel to the Coach Company's line."

Over a year later, that is to say, on November 8th, 1906, the ordinance, under which the defendant claims the power to suppress the advertising signs in question, went into effect (Rec. 21).

This ordinance, as construed by the Court of Appeals clearly prohibits the placing of advertisements on the outside of plaintiff's stages under the above quoted provision of the agreement of May 15, 1905. Nothing can be clearer than that these stages became, by reason of this provision of the agreement of 1905 (Rec. 41 and 113), advertising wagons under the ordinance of 1906 as construed by the Court of Appeals.

In any event, therefore, the obligation of the contract of May 15, 1905, is impaired by the subsequent legislative enactment of the City of New York of November 5th, 1906.

It may be contended that there were in succession two pre-existing ordinances covering the same subject as found by the court (Rec. 21), and also that upon the trial of the action, the following statement was made by plaintiff's counsel in reference to the series of three ordinances relating to advertising wagons (Rec. 58).

"But I do admit that they have appeared on the ordinances of the City and have not during that time been repealed."

This statement, however, merely concedes that the second ordinance was not repealed until November 8th, 1906, the day the third ordinance went into effect, and that the third ordinance had not been repealed up to the day of the trial.

If claim be made that the contract of 1905 was at the time of its being made obnoxious to a then existing ordinance, to-wit: the ordinance of 1897, which was repealed in 1906, the answer is that this is not so.

The prior ordinance of 1897 did not affect the validity of the contract of 1905. Between these dates, and before, advertising on the exterior space of the vehicles and street structures of common carriers was freely allowed under this ordinance by the authorities of the City of New York, as found by the Trial Court and elaborated by the evidence, and contracts in relation to it were considered valid (Rec. 19, 20, 40, 41, 59-64).

The practical construction given to the terms of enactments of legislative bodies by those charged with enforcing them, has long been al-

lowed controlling effect by the Courts, and is considered part of the statute or ordinance. This is specially true where practices encouraged by such construction have prevailed for a long period of time.

In *N. Y., N. H. and H. R. R. Co.* v. *Interstate Commerce Commission,* 200 U. S. 361, Justice WHITE, speaking of rulings made by the Interstate Commerce Commission, said at page 401:

"We make this concession, because we think we are constrained to so do, in consequence of the familiar rule that a construction made by the body charged with the enforcement of a statute, which construction has long obtained in practical execution, and has been impliedly sanctioned by the re-enactment of the statute without alteration in the particulars construed, when not plainly erroneous, must be treated as read into the statute."

The plaintiff entered into the contract of May 15, 1905, while the second ordinance of the series, that of 1897, was still in force. This contract was valid under that ordinance, as construed by those charged with enforcing it. It cannot, therefore, be impaired by the ordinance of 1906, even if such ordinance were valid as to proceedings *in futuro.*

In *United States* v. *Macdaniel,* 7 Pet. 1, Justice MCLEAN referring to certain practices current in the Navy Department at Washington, and to the powers of executive officers of government, said at page 14:

"Hence, of necessity, usages have been established in every department of the government, which have become a kind of common law, and regulate the rights and duties of those who act within their respective limits. And no change of

such usages can have a retrospective effect, but must be limited to the future. Usage cannot alter the law, but it is evidence of the construction given to it; and must be considered binding on past transactions."

It is superfluous to cite authorities to the general proposition that a municipality or even a State, cannot impair the obligation of contracts between two corporations by subsequent legislation beyond a quotation from the opinion of Judge NELSON in

Chicago v. *Sheldon,* 76 U. S. 50, as follows (p. 55):

"A contract having been entered into between the parties, valid at the time, by the laws of the State, it is not competent even for its legislature to pass an act impairing its obligation, much less could any decision of its courts have that effect."

The ordinance impairs the obligation of the contract between the State of New York and the plaintiff.

It is well settled that this Court has jurisdiction and will determine for itself the question of whether or not such a contract exists and whether the ordinance complained of impairs its obligation.

Mobile and Ohio R. R v. *Tennessee,*
153 U. S., 486, at p. 493.

The position of the plaintiff in error is analagous in case of the contract between itself and the State to the case of the contract subsisting between itself and the Railway Advertising Com-

pany as far as concerns the impairment of their obligations.

By original incorporation and the special franchise rights granted it by the legislature of New York in 1886 and 1889, the Fifth Avenue Transportation Co. Ltd. as shown in the Statement of Facts (*supra*, pp. 1 and 2) acquired the corporate right to run its stages upon Fifth Avenue and other streets in New York City and to lease incidentally any portion of its property, including the space upon which the advertisements have been placed. To these rights the plaintiff in error has succeeded.

The naming of the Fifth Avenue Transportation Company in its special charter, viz., the acts of grant of its street franchises above referred to, was a plain recognition by the Legislature of the capacity of the Company to exercise the incidental power of leasing space on stages under the power to lease property specified in its certificate of incorporation. See

Society, etc. v. *Town of Pawlet*, 4 Pet., 480, at p. 502,

in which Mr. Justice Story, uses language of which the above is a partial paraphrase as follows (italics ours):

"But the point here raised is not so much, whether the plaintiffs are entitled to sue generally as a corporation, as whether *they have shown a right to hold lands*. The general issue admits not only the competency of the plaintiffs to sue, but to sue in the particular action which they bring. But in the present case, we think, there is abundant evidence in the record, to establish the right of the corporation to hold the lands in controversy. In

the first place, it is given to them by the royal charter of 1761, which created the Town of Pawlet. *Among the grantees therein named, is 'the Society for the Propagation of the Gospel in Foreign parts,' to whom one share in the township is given. This is a plain recognition, by the crown, of the existence of the corporation, and of its capacity to take. It would confer the power to take the lands, even if it had not previously existed.''*

By further legislation, Chapter 657 of the Laws of 1900, the plaintiff in error acquired the right to extend its lines, with the same right of leasing its property, upon additional streets, provided it changed its equipment and operated automobiles by electricity. The plaintiff did extend its lines and changed its equipment accordingly and now operates the same as required all of which is shown by the findings of the court (Rec. 12, 13, 14).

When the Charter of the City of New York was revised a year later, Chapter 466 of the Laws of 1901, all such rights as had been thus acquired by the plaintiff in error were specifically recognized. (Laws 1901, Chapter 466, § 1461).

The earlier ordinance of 1897 was never construed or regarded as affecting the leasing to advertising companies of space inside or outside these stages, whether horse drawn or propelled by electricity.

As stated by Justice McLean, in *State Bank of Ohio* v. *Knoop*, 16 How. 369, as follows (p. 380):

''Every valuable privilege given by the charter, and which conduced to an acceptance of it and an organization under it, is a contract which can-

not be changed by the legislature, where the power to do so is not reserved in the charter."

See also

Pearsall v. *Great Northern Ry. Co.*, 161 U. S. 646, 663;
New Orleans Gas Co. v. *Louisiana Gas Light Co.*, 115 U. S. 650, 681.

It may be superfluous to state the point, but of course if the ordinance of 1906 and its two predecessors are void as an invalid exercise of police power, as shown under "Second Point," *supra*, pages 38 to 56, it necessarily follows that the enforcement of the ordinance affects the obligation of the contract as stated under this point.

The use of the space under discussion in this brief for advertising purposes by the Company was therefore the subject of a valid contract right as between the plaintiff in error and the State, when the ordinance of 1906 was enacted.

The judgment should be reversed, with costs.

WILLIAM H. PAGE,
GILBERT H. CRAWFORD,
Of Counsel for Plaintiff in Error.

Washington, April 21, 1911.

Office Supreme Court, U. S.
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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1910.

No. 159.

FIFTH AVENUE COACH COMPANY, PLAINTIFF-IN-ERROR

against

THE CITY OF NEW YORK, DEFENDANT-IN-ERROR.

BRIEF OF DEFENDANT-IN-ERROR.

THEODORE CONNOLY,
Acting Corporation Counsel,
Attorney for Defendant-in-Error.

THEODORE CONNOLY,
TERENCE FARLEY,
Of Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1910.

No. 159.

FIFTH AVENUE COACH COMPANY
Plaintiff-in-Error,
against
THE CITY OF NEW YORK,
Defendant-in-Error.

Brief of Defendant-in-Error.

This suit in equity was originally brought to restrain the defendant-in-error

> "from interfering in any way with the property "of the plaintiff; that is, with the advertising "signs or matters permitted, placed or used by "the plaintiff, or under its direction, upon the "exterior of the stages or any of them operated "upon its routes in the Borough of Manhattan, "City of New York, or from molesting or in "any way interfering with said stages or the "operation thereof, * * *" (Record, p. 5).

Pleadings.

BILL OF COMPLAINT.

It is alleged in the Bill, which will be found on pages 4 and 5 of the Record, that the plaintiff-in-error is a corporation organized and existing under

and by virtue of the laws of the State of New York; that it is engaged in the operation of automobile stages along certain routes in The City of New York, and that by proceedings duly had it succeeded to and acquired all the property, rights, franchises and powers of a certain other corporation known as the Fifth Avenue Transportation Company, Limited, which was likewise organized under the laws of the State of New York.

The defendant-in-error is a municipal corporation organized and existing under and by virtue of its ancient charters and the laws of the State of New York.

For many years the plaintiff-in-error displayed advertising signs or matter in the interior of its stages. In or about the month of May, 1905, it began utilizing the exterior portions of its stages for advertising purposes. In July, 1907, the complete substitution of automobile stages for horse stages having been effected, it then began to advertise much more extensively, owing to the fact that, by reason of the necessary difference in the form of the new vehicles, it had more space which was adapted for such use.

The use of this space for advertising purposes enabled the plaintiff-in-error to secure a substantial income therefrom. It is then alleged, and it was on this ground that this suit was cognizable on the equity side of the Supreme Court of the State of New York, that the defendant-in-error, through its officials, "has interfered with the operation of plain-
"tiff's advertising upon the exterior of its said stages
"and with the operation of said stages," and that it threatens and intends "to continue to interfere with
"the operations of the plaintiff's said stages by force
"and prevent it from maintaining advertising signs
"upon the exterior thereof."

Such threatened action, it is alleged, will materially hamper the plaintiff's business, reduce its income, "will interfere with the exercise of its rights "and franchises granted by and under authority of "the State of New York and will infringe its con- "stitutional right to freedom in the use of its prop- "erty."

Answer.

The defendant-in-error, in its Answer (Record, pp. 6, 7), alleges that the advertisements in question constitute a violation of one of its municipal ordinances, to which we will hereafter more particularly refer; that they likewise violate the laws of the State of New York, more particularly the Charter granted by the State of New York to the defendant-in-error, and that they are an unauthorized use of the public streets and a nuisance.

For these reasons, it is alleged that it was and is the duty of the defendant-in-error to prevent such unauthorized use of its streets and to abate such nuisance.

Upon the issues thus framed, the suit was tried before the Hon. David Leventritt, one of the Justices of the Supreme Court, and resulted in a dismissal of the Bill of Complaint upon the merits (Record, p. 23).

From the Judgment which was entered the plaintiff-in-error appealed to the Appellate Division of the Supreme Court, First Department, and that tribunal unanimously affirmed it.

Order of Affirmance, Record, p. 152.
Judgment of Affirmance, Record, pp. 152, 153.

The effect of such an unanimous affirmance, under the practice which prevails in the State of New York,

is to prevent the Court of Appeals, in case a further appeal is taken to it, from reviewing the facts or from inquiring whether the findings, which were unanimously affirmed, are supported or sustained by competent proof.

A further appeal was taken to the Court of Appeals, and on the 6th day of January, 1909, a decision was made affirming in all things the judgment of the Appellate Division (Record, p. 1).

Subsequently, on the 14th day of January, 1909, an order on remittitur was made by the Special Term of the Supreme Court wherein and whereby it was adjudged that the judgment and order of the Court of Appeals be made the judgment and order of the Supreme Court (Record, pp. 155, 156).

Thereafter, on the 20th day of January, 1909, a judgment for costs in favor of the defendant-in-error and against the plaintiff-in-error for the sum of $163 costs was duly entered (Record, pp. 156, 157).

The Record (pp. 160-163) then discloses that a petition for a writ of error was filed and allowed. Nine grounds of error are assigned, the more important of which are, in substance, as follows:

(2) That the Court of Appeals erred in holding that the municipal ordinance, to which we will hereafter refer, was a valid exercise of the legislative authority granted to the defendant-in-error by the State of New York; that such authority warranted it in interfering with the display of advertising signs on the exterior of the stages owned by the plaintiff-in-error, and that the latter

> "had no remedy against the defendant for the
> "taking of its private property by said interfer-
> "ence with said advertisements, thereby holding

"and deciding that said plaintiff might be de-
"prived of its property aforesaid without due
"process of law, in violation of the Constitution
"of the United States, and especially of section
"1, article XIV. of the amendments thereto."

(5) That the Court erred in holding

"that the display of advertisements on the ex-
"terior of plaintiff's said vehicles is not a prop-
"erty right appurtenant to the ownership of
"private property."

(7) That the Court erred in holding that the application of the ordinance to the plaintiff-in-error did not impair the obligation of its contracts, either with the State of New York or with the Railway Advertising Company, with which it had an agreement to display advertising matter on the interior and exterior of its vehicles.

(8) That the plaintiff-in-error is deprived of the equal protection of the laws guaranteed to it by the Fourteenth Amendment,

"in that said defendant-in-error allows other
"transportation companies than plaintiff-in-
"error to display advertising signs on the ex-
"terior of their property."

Assignments of Errors, pp. 164-167.

Other assignments of error are made, but they are merely restatements in different language of the same propositions.

Facts.

A perusal of the facts, to which we now invite the attention of the Court, will make it perfectly clear, it seems to us, that there are no federal questions involved in this case, and that none of the

constitutional rights of the plaintiff-in-error have been invaded.

Plaintiff's predecessor in title, The Fifth Avenue Transportation Company, Limited, was organized under chapter 611 of the Laws of 1875 of the State of New York, which is entitled, "*An Act to provide "for the organization and regulation of certain busi- "ness corporations.*" Its Certificate of Incorporation (Record, p. 23) recited, among other things, that the company was to be organized

> "to carry passengers and property for hire, in "all kinds of vehicles drawn by horses, except- "ing tram-cars; to establish, maintain and op- "erate stage or wagonette routes for public use "in the conveyance of persons and property; "to take and convey persons and property in "stages or wagonettes, and to provide and run "the necessary stages or wagonettes, or both, "under its route for the public use, or both, "and to receive compensation therefor * * *; "to deal in horses and to manufacture and deal "in harness and all kinds of vehicles drawn by "horses, excepting tram-cars, and all kinds of "merchandise and commodities pertaining to or "incidentally connected with or necessary and "useful in the business aforesaid or which can "be made or dealt in profitably in connection "with said business, * * *."

What is termed the original franchise of The Fifth Avenue Transportation Company is chapter 536 of the Laws of 1886, which is entitled:

> "*An Act to authorize The Fifth Avenue "Transportation Company, Limited, or its "assigns, to run stages on Fifth avenue through "Washington Park, and through South Fifth "avenue to the Bleecker street elevated railway "station in The City of New York, and return.*"

It provided, in section 1 thereof, that the Company and its assigns

> "are hereby authorized, on the payment of the "license fees, as hereinafter provided, to run "and drive, or cause to be run and driven, and "without further authority from said city, a "line of stages or carriages, **for the trans-"portation of passengers for hire,** "from Eighty-ninth street in the city of New "York down Fifth avenue across Washington "Park; and along South Fifth avenue to the "Bleecker street elevated station and return "* * *" (Record, p. 24).

The route of the Company was further extended by Laws of 1889, chapter 182, by which its authority was specially limited to the operation of a line of stages or carriages for the transportation of passengers and parcels for hire (p. 76).

Thereafter the corporation was dissolved and went into the hands of a receiver, who, subsequently, under an order of the Court, sold its rights and property to one Ward Campbell (p. 88).

Pursuant to the authority contained in the Laws of 1892, chapter 668, section 3, amending the Stock Corporation Law, the plaintiff was incorporated July 25, 1896 (p. 26), for the purpose of taking over the property and franchises of The Fifth Avenue Transportation Company, and it received from Ward Campbell a bill of sale of the rights, franchises, etc., of The Fifth Avenue Transportation Company. A description of the property sold, as stated in the Certificate of Incorporation, was:

> "All the rights acquired by and granted to "The Fifth Avenue Transportation Company, "Limited, by the acts of the Legislature of the

"State of New York, to wit: chapter 536 of the "Laws of 1886, and chapter 182 of the Laws of "1889; and all the right to run or drive, or "cause to be run or driven, a line of stages or "coaches for the transportation of passengers "for hire from Eighty-ninth street in The City "of New York, down Fifth avenue," etc. (pp. 95, 96).

These rights were, of course, subject, as provided in the third section of chapter 668 of the Laws of 1892, just cited, to "all the provisions, duties and "liabilities imposed by law on such corporation."

It will thus be seen that the plaintiff-in-error was nothing more or less than a common carrier of passengers, and that it had no right, excepting that such a right is incidental to the business of a common carrier, to embark or engage in the advertising business.

But even assuming that the plaintiff-in-error possesses the incidental power to engage in the advertising business, its right to do so, we submit, that is, so far as the public streets and highways, at least, are concerned, is subject to the regulatory power of the State and its political subdivisions.

Section 41 of the Municipal Code of Ordinances (Record, p. 22) provides that

"Sec. 41. **No advertising trucks, "vans or wagons shall be allowed "in the streets of the Borough of "Manhattan under a penalty of "$10 for each offense. Nothing "herein contained shall prevent "the putting of business notices "upon ordinary business wagons "so long as such wagons are en- "gaged in the usual business or**

"**work of the owner and not used**
"**merely or mainly for advertis-**
"**ing.**"

For the purpose of enabling the Court to pass upon the questions involved and to obviate the necessity of proof, it was stipulated on the trial of this suit (Record, p. 34)

"that the defendant, through its various officials
"and officers, has threatened and threatens to
"prevent the use of the exterior space upon the
"stages operated by the plaintiff for the display
"of advertising matter, and to cause the re-
"moval thereof, and intends to do so until and
"unless restrained by an order of this Court."

Findings.

Among other things, the learned Trial Justice found:

"*Twenty-first*—In the month of July, 1907,
"plaintiff substituted for the stages theretofore
"operated by it upon Fifth avenue, stages pro-
"pelled by gasoline power and simultaneously
"therewith there appeared upon the exterior of
"said stages certain advertising signs located
"therein and of size as follows: Two signs run-
"ning along parallel with the sides of the stages
"a distance of 13 feet, extending from the floor
"of the upper deck and above the roof of the
"stages in an upward direction, a distance of 2
"feet 7 inches in height.

"A sign located on the front portion of the
"stage, over the hood, standing upright and
"measuring 2 feet 1 inch in height, and running
"from one side of the stage to the other, a dis-
"tance of 6 feet 6 inches.

"A sign located over the hood of the back of
"the stage 4 feet 4 inches long by 2 feet 1 inch
"high.

"A sign located at the rear of the stage, run-
"ning along the side and back staircase leading
"from the body to the roof of the stage, 8 feet
"long and about 20 inches wide.

"A sign located under the said staircase
"measuring 2 feet 4 inches square.

"A sign located on each riser of the steps
"leading from the body to the roof of the coach.

"Signs on the back of each seat on the roof
"of each stage 2 feet in length, which were not
"visible from the street."

(*Note*—The situation, perhaps, will be better understood by referring to the pictorial exhibits, pp. 139-150.)

What signs were displayed between July and September, 1907, appear in the Twenty-second Finding (Record, pp. 14, 15), and those which were displayed during the month of September, 1907, are set forth in the Twenty-third Finding (Record, pp. 15, 17).

We again quote from the Record, at page 17:

"*Twenty-fourth*—Early in the month of De-
"cember, 1907, the advertisements displayed
"upon the said advertising signs were changed,
"and there were substituted for the advertise-
"ments theretofore displayed thereon, and there
"are still displayed thereon, the following:

"Upon the signs running parallel with the
"sides of the stages, extending from the floor
"of the upper deck and above the roof of the
"stages, two of the following signs appeared,
"one on each side of the stage:

"A landscape representing a scene in some
"Eastern country. To the left of the picture

"is a stone wall painted a dark color, with the "words 'Helmar Turkish Cigarettes' painted "in white letters with black shading around the "letters. The size of this wall is about 4 feet "long. The first letter of the word 'Helmar' "measures about 12 inches, and the last letter "about 9 inches. The words 'Turkish Cigar-"'ettes' are in smaller letters underneath the "word 'Helmar.' To the right of the picture "are the figures of two pack camels and three "men in oriental costume of various colors. "Behind the camel, near the right of the pic-"ture, are columns, and to the right thereof, a "package of cigarettes with the word 'Helmar' "near the top, and the words 'Turkish Cigar-"'ettes' in smaller letters near the bottom "thereof. There are many colors upon said pic-"ture, including green, dark blue, white, light "blue, yellow, drab and various shades of red. "Upon it is painted the head and bust of a "woman. The size of the package of cigarettes "is 20 by 16 inches.

"Another sign depicts a picture of a stone "structure resembling a fortress and is painted "brown, and on the side of this fortress are the "words 'Helmar Turkish Cigarettes' painted in "white letters shaded black. In the background "is a blue sky, and the ground is yellow and "blue in color. In the centre of the picture is "the figure of a man in Eastern costume with a "lighted torch held aloft. In the distance is a "camp of four or five tents and a light blazing "up from the centre thereof. To the extreme "right is painted a green package of cigarettes "with yellow appearing on the left side thereof; "upon it is painted the head and bust of a "woman. The size of the package is 20 by 16 "inches.

"Another sign depicts a yellow sky which, near "the portion representing the road, is red. "Ruins or stone work occupied a great deal of "the picture on which is painted a red sign six "feet long. Upon this sign are painted the "words 'Helmar Turkish Cigarettes' in white "letters shaded in black. The letters are about "ten inches high. Represented in the pic- "ture are a man and camel with the latter in a "sitting position; the man in green Turkish cos- "tume; the sand or ground part in this picture "is yellow.

"Another sign depicts a large stone structure "with the words 'Helmar Turkish Cigarettes' "painted on the side thereof. The word 'Hel- "mar' is six feet long. Upon the picture is "portrayed a stone figure of the spring with a "figure bearing a package of cigarettes lean- "ing against it. Upon the package is painted "the head and bust of a woman; the size of the "package is 20 by 16 inches.

"The sign over the hood at the front of all the "stages operated since the early part of De- "cember, 1907, are bright red, having painted "thereon in white letters, shaded black, the "words 'Helmar Turkish Cigarettes.'

"The sign over the hood at the rear of all the "stages operated since the early part of De- "cember, 1907, are bright red, having painted "thereon in white latters, shaded black, the "words 'Helmar Turkish Cigarettes.'

"The signs upon the stages operated since "the early part of December, 1907, which run "along the side and back staircase leading from "the body to the roof, are of bright red with the "words 'Helmar Turkish Cigarettes' shown "thereon in white letters shaded black.

"The sign under the staircase on all the stages "operated since the early part of December, "1907, are painted a bright yellow and has "painted thereon in white letters, shaded black, "the words 'Helmar Turkish Cigarettes.'

"Upon the riser of each step of the staircase "leading from the body to the roof of the coach "are the words 'Helmar Turkish Cigarettes.'"

It was also found by the Trial Justice (Record, p. 20) that

"*Thirty-second*—**The advertising "signs displayed on the stages of "the Fifth Avenue Coach Com- "pany, the plaintiff herein, have "no relation to the physical com- "fort, safety, health or conven- "ience of the passengers or pub- "lic, or the operation of the "stages**"; that (Record, p. 22)

"*Forty-fifth*—The plaintiff is not authorized, "by its charter or by law, to display advertising "signs on the exterior of its stages"; and that

"*Forty-sixth*—**The use of the exter- "ior of the stages for advertising "purposes is not a stage use; it is "not in furtherance of the corpor- "ate objects; it is not necessary to "the performance of any corporate "duty; it is not an element in the "consummation of any purpose for "which the corporation was form- "ed; it is a distinct and separate "enterprise unrelated to the "duties and objects of the plaintiff "as a common carrier.**"

And the learned Trial Justice concluded, as matter of law (Record, pp. 22, 23), that, while the ad-

vertisements in question were not a nuisance and could not be judicially condemned on aesthetic grounds, the franchise of the plaintiff-in-error did not give it the right to display advertisements for hire upon the outside of its stages and that such displays, for remuneration, were *ultra vires*.

Furthermore, he concluded, and these conclusions are extremely important when we come to consider the constitutional objections which are urged by the plaintiff-in-error, that

> "*Tenth*—**That the streets of The "City of New York can be used "only for municipal or street pur- "poses, and the display of adver- "tising signs upon the exterior of "the stages operated by plaintiff "on Fifth avenue is neither a mu- "nicipal nor street purpose**" (Record, p. 23); and that

> "*Eleventh*—**The right to utilize the "exterior of the plaintiff's stages "for advertising purposes is "neither incidental to nor implied "by the powers conferred by the "plaintiff's charter or by law.**"

The opinion of Mr. Justice Leventritt, which will be found on pages 119-138 of the record, is not only very interesting, because of the novel propositions of law discussed by him, but it also contains, it seems to us, a very complete answer to the constitutional objections which are now urged by the plaintiff-in-error. Regarding the Ordinance, which is now the subject of attack and which is printed *ante*, page 8, he says:

> "The ordinance is constitutional. As I have "shown, no right exists in the plaintiff to en-

"gage in exterior advertising, and the contracts "having that object in view are *ultra vires.* "Therefore, any ordinance designed to prevent "the display of plaintiff's signs could not be "held to deprive it of its property without due "process of law, or to deprive it of the equal "protection of the laws within the meaning of "the Fourteenth Amendment of the Constitu- "tion of the United States, or to impair the "obligation of its contracts.

"The discrimination, which the "plaintiff claims is affected by this "conclusion, has no existence in "fact. There is not a scintilla of "evidence that any common car- "rier anywhere enjoys the privi- "lege of displaying on the outside "of its vehicles signs similar to "those carried by the plaintiff's "stages or even approaching them "in similarity. The Ordinance is "broad and bears equally upon all "public and quasi-public corpora- "tions."

The majority opinion of the Appellate Division (Record, pp. 153, 154) proceeds on the theory that equity will not enjoin the commission of an alleged illegal act, especially where it appears that the plaintiff has an adequate remedy at law, in the nature of an action to recover damages. Three of the Justices, however, while concurring in the affirmance of the judgment on the ground stated, expressed the opinion

"that the plaintiff has no right or "authority to use its stages for the "purposes of advertising any

> **"other business than that which it "conducts itself."**

Judge Chase, who wrote the opinion of the Court of Appeals, in effect held (Record, pp. 172-177) that the plaintiff-in-error

> "failed to show that the maintenance of such "exterior advertisements is within its express "franchise rights or that such ordinance pro- "hibiting their maintenance on its stages is not "a proper exercise of the authority vested in "the City to regulate the business conducted "in the streets thereof."

In support of the judgment of the State Court the defendant-in-error urges the following

POINTS.

I.

This Court should not entertain this appeal for the reason that there are no federal questions involved in it.

It must be patent from the foregoing that the question which this Court is asked to determine substantially is:

Are the constitutional rights of the plaintiff-in-error, which necessarily depend for their existence on the alleged incidental power of a common carrier to engage in the advertising business,—a question which has been decided against the plaintiff-in-error by the State Courts,—violated by the holdings of such courts, that the contracts made by it for dis-

playing advertisements on the outside or exterior of its stage are *ultra vires*, and, furthermore, that they violate one of the municipal ordinances of the defendant-in-error?

A few suggestions, we think, will make it perfectly clear that no federal questions are involved.

(*a*) Whether or not plaintiff-in-error "had the "right, as a right of property incidental to its "ownership of such stages, to display advertise- "ments on the exterior thereof, and to receive re- "muneration therefor," depends upon the question whether such a right is a necessary incident to its corporate existence. That proposition involves the construction of the statutes which constitute the franchise which the State has granted to the plaintiff-in-error. It is difficult to appreciate how such construction involves a federal question.

Sage *vs.* Louisiana, 144 U. S., 647.
Powell *vs.* Brunswick County, 150 U. S., 433.
Turner *vs.* Wilkes County Commrs., 173 U. S., 461.
Gulf, etc., Rd. Co. *vs.* Hewes, 183 U. S., 66.
Orr *vs.* Gilman, 183 U. S., 278.

It also involves the question whether the acts of the plaintiff-in-error amount to a violation of a municipal ordinance. Neither is that, we submit, the subject of review in this Court.

Fischer *vs.* St. Louis, 194 U. S., 361.

(*b*) The Ordinance of the Board of Aldermen, under which the defendant-in-error and its representatives acted, is a valid exercise of the legislative power which was vested in that body by the Charter of The City of New York.

We use the words "*legislative power*" advisedly. Police power means a regulation or prohibition of something which would otherwise be legal. If plaintiff-in-error had the right to the unrestricted use of the streets for advertising purposes, an Ordinance limiting those rights would have to be justified as an exercise of the police power. Here the situation is different. The streets are owned by the City, in trust for street purposes, for the use of the public. Those uses are limited to the right of passage and transportation and nothing else. In order to be in a position to justify its present contention, that it is entitled to use the street for other than street purposes, the plaintiff-in-error must show some permission or license from the owner or the trustee in charge of the property. Supposing the plaintiff-in-error had an easement of passage across private property, would that justify it in conducting an advertising business on those premises? That is just what the plaintiff-in-error is attempting. There is an additional consideration and that is that the plaintiff-in-error is also attempting to engage in a business entirely foreign to the purposes of its organization.

(*c*) The contracts made by the plaintiff-in-error to display advertisements on the exterior of its stages are *ultra vires* and void. They are not impaired, therefore, in a constitutional sense, by the Ordinance of the Common Council.

New Orleans *vs.* New Orleans Water Works Co., 142 U. S., 79.

Central Land Co. *vs.* Laidley, 159 U. S., 103.

Bacon *vs.* Texas, 163 U. S., 207.

(*d*) As Justice Leaventritt points out in his opinion (Record p. 137), an excerpt from which we print, *ante*, pp. 14, 15, the contention now made,

> "that said defendant in error allows other "transportation companies than plaintiff in "error to display advertising signs on the ex- "terior of their property, thus depriving your "petitioner of the equal protection of the laws,"

is purely fanciful and there is no evidence in this record to substantiate such a claim.

> New York and C. Min. Syndicate & Co. *vs.* Fraser, 130 U. S., 611.
> Claassen *vs.* United States, 142 U. S., 140.

An assignment of errors cannot be availed of to import questions into a cause which the record does not show were raised in the court below.

> Ansbro *vs.* United States, 159 U. S., 695.

And in order that the Supreme Court may have jurisdiction to review a judgment of the state court there must be a real and not a fictitious federal question involved.

> Millingar *vs.* Hartupee, 6 Wall., 258.
> New Orleans *vs.* New Orleans Water Works Co., 142 U. S., 79.
> Hamblen *vs.* Western Land Co., 147 U. S., 531.

II.

A common carrier has no common law right to use the public highways for advertising, not its own, but somebody else's business. Such purposes are entirely foreign to the objects of its incorporation.

In the evolution and growth of the common law it may be true that originally the highways of England were open to the indiscriminate use of hawkers and peddlers to cry their goods and vend their wares. But such a state of affairs did not continue for any appreciable length of time. The commercial value of such privileges was speedily recognized and made a source of revenue and markets were accordingly established, and such employments as hawking and peddling were prohibited unless licensed.

"Hawkers and Peddlers," 15 Am. & Eng. Ency. Law (2d ed.), 290,
"Markets," 19 *Id.* (2d ed.), 1139.

Specific authority has been conferred upon the defendant-in-error to provide for licensing and otherwise regulating the business of hawkers, peddlers, vendors, etc. (Revised Charter, sec. 51), and no doubt can exist as to the validity of such statutes.

People *ex rel.* Larrabee *vs.* Mulholland, 82 N. Y., 324.
Village of Stamford *vs.* Fisher, 140 N. Y., 187.
Thousand Island Park Assn. *vs.* Tucker, 173 N. Y., 203.

We therefore dispute the contention of the plaintiff-in-error that any person, much less a common carrier, has a common law right to either hawk or peddle without being licensed. And a license, we may observe, is merely a privilege; it may be granted or withheld in the discretion of the licensing power.

Matter of Armstrong *vs.* Murphy, 65 App. Div., 123.
People *ex rel.* Schwab *vs.* Grant, 126 N. Y., 473, 481, 482.

But whatever may have been the early common law in England on the subject of what were legitimate street uses, such was not the law of that country at the time of the adoption of the State Constitution in 1777, and is not, therefore, the common law of the State of New York. The subject was discussed in

Palmer *vs.* Larchmont Electric Co., 158 N. Y., 231.

where the Court of Appeals said:

"The primary object of highways is for the "public travel by persons and animals, and by "carriages or vehicles used for the transporta- "tion of persons and goods other than by rail- "roads. Sewers drain the surface water from "the highways and thus relieve them from im- "pairment and destruction. In this respect "sewers are for a street purpose. In addition "they may drain also the abutting property and "houses, and thus tend to promote the public "health. In this respect they are for a munici- "pal purpose. Water supplied by mains "through the highways may be used for cleans- "ing and sprinkling the streets. In this respect "it is for a street purpose. It may be used by

"the abutting owners for cleaning and for do-
"mestic purpose, and is also used for the ex-
"tinguishment of fires. In this respect it is
"for a municipal purpose. Light is an aid to
"the public in the night time in traveling upon
"the highway. It is therefore used for a street
"purpose. All of the street purposes which we
"have referred to are clearly incident to the
"highway and are deemed within the grant of
"lands for highway purposes whenever the
"necessity for these uses arises. Not so with
"telegraph and telephone wires. They in no
"way preserve or improve the streets or aid the
"public in traveling over them."

See, also,

Osborne *vs.* Auburn Telephone Co., 189 N. Y., 393,

where the same Court said:

"When the streets have been appropriated
"for the construction of sewers, the laying of
"water mains or gas pipes for street purposes,
"such sewers, mains and pipes may also be used
"by the public for municipal purposes. But the
"use of the street for municipal purposes or
"individual purposes, independent of its use for
"street purposes, is an additional burden upon
"the fee not included in the grant of the lands
"for highway purposes. We are aware that in
"recent years our highways and streets have
"been appropriated for municipal and individ-
"ual uses in many instances."

This is especially true in The City of New York where subways or conduits for wires have been constructed through which electricity, is transmitted,

not only for lighting but also for telegraph, telephone and power purposes. Pipe lines have also been laid through which steam and other products are conveyed. These cannot be said to be street purposes. **But in this City the municipality owns the fee of the streets, and it may therefore contract, sell or grant the use of the streets for other purposes which are not inconsistent with and do not impair the public easement or use for street purposes.** Many other cities have followed New York in acquiring the fee of the streets. In such cases the fee having been transferred to the municipality, it can grant rights in the streets for other than street purposes, which do not impair the public easements.

Thus we see that the highways of this City may, with its permission, be subjected to uses which are not, strictly speaking, street uses. This is so because the City owns the streets in fee. It follows, therefore, that all the easements which the public have in our streets are those of passage and repassage and the use of them for the purposes of transportation; without the permission of the City everything else is forbidden.

III.

The highway may only be used for municipal or street purposes. The display of advertisements upon the stages of the plaintiff-in-error is neither a municipal nor a street purpose.

In

Hatfield *vs.* Straus, 189 N. Y., 208,

the Court said:

> "There can be no doubt that municipal "authorities having the care and control of the "streets in a city may authorize their temporary "use by private parties for private purposes to a "limited extent. The precise limits beyond "which that power cannot be exercised have not "been very specifically or accurately defined and "perhaps cannot be. The governing body in a "city may permit private parties to deposit "building materials in the streets, to construct "and use coal holes, cellarways, areas, vaults "under the sidewalks, awnings above, and the "like. But all these and all similar uses of the "public streets for private use are either ex- "pressly authorized by statute or sanctioned by "the courts as being exceptions to the general "rule, born of necessity and justified by public "convenience and custom. The right to such "use is given to the general public and enjoyed "by all citizens alike. In the present case the "privilege has been granted to private parties "and is special and peculiar."

Citing,

Callanan *vs.* Gilman, 107 N. Y., 360.
Hoey *vs.* Gilroy, 129 N. Y., 132.
Jorgensen *vs.* Squires, 144 N. Y., 280.

See, also,

Ackerman *vs.* True, 175 N. Y., 353.

The case at bar is far weaker than *Hatfield* vs. *Straus* because in that case there was apparent municipal sanction for the use which was made of the streets, while in the case at bar the plaintiff-in-error, without even the pretense that it was acting pursuant to authority from the City, arrogated to itself the right to display these advertisements.

From our point of view it is extremely doubtful whether the City itself could sanction these displays.

In

State *ex rel.* Belt *vs.* St. Louis, 161 Mo., 371; 61 S. W. Rep., 658,

an Ordinance of the City of St. Louis was under consideration which directed and empowered the erection and maintenance upon the streets and public places of the city of boxes or receptacles for the collection of waste paper or other litter which might be cast upon the streets or public places of the city. By the Ordinance, the Board of Public Improvements of the city was authorized, directed and empowered to enter into a contract with Frederick R. Belt to erect and maintain the boxes or receptacles, which were to be erected, maintained and kept clean by the said Belt without cost to the city. The Ordinance further provided:

"Sec. 4. That for and in consideration and "as full compensation to said Belt, or his as- "signs, for erecting, maintaining and keeping "clean all said boxes or receptacles, said Belt,

"or assigns are to have and possess all waste "paper and other litter cast and deposited in "said boxes or receptacles, and are also to have "the exclusive rights and privilege to place ad- "vertisements on such boxes or receptacles for "the benefit of himself or assigns; provided, "however, that no advertisement which is "of an immoral or disreputable character shall "be placed thereon; and provided, that all ad- "vertising signs shall be made of tin or other "metal, and no bill or advertisement on paper is "to be posted upon said boxes or receptacles; "and provided further, that no advertisement "of any kind shall be placed on any of said "boxes or receptacles until the same shall have "first been submitted to and approved by the "Board of Public Improvements of said city."

Various objections were raised to the legality of the ordinance. Among others, that the privilege given was the devotion of public property to private purposes. On this question the Supreme Court of Missouri said:

"But there is another view to be taken of this "ordinance. **It subjects the public "streets to a purely private pur- "pose, to wit, the advertising of "individual business and enter- "prises. Can the City devote its "streets to such purpose? We "hold that it cannot.** The Charter gives "the City 'power to regulate the use of the "streets.' Under this grant it may, it is true, "not only regulate the travel thereon, but it "may allow gas, water and sewer pipes to be "laid therein, and permit telegraph and tele- "phone poles to be erected therein, because all "of these uses are consistent with the use for "which they are dedicated or condemned

" (*Schopp* vs. *City of St. Louis*, 117 Mo., 136).
" * * * Referring now to the ordinance, it
" will be observed that it confers upon Belt the
" exclusive right to place advertisements on such
" boxes for the benefit of himself and his as-
" signs. In a word, the City has attempted to
" farm out its sidewalks and streets to a private
" person for advertising. Belt is free to make
" his own charges for advertising. No power
" is reserved to the City, even if it were a pur-
" pose to which it could devote the streets, to
" regulate the charges for advertisements. The
" legislative authority of the City should not
" thus be delegated, nor could it abdicate its
" control over the public streets held by it in
" trust for the public, and create a monopoly in
" favor of one advertiser (*Matthews* vs. *City of*
" *Alexandria*, 68 Mo., 115; Cooley Const. Lim.
" (6th Ed.), 247-253; *Gale* vs. *Village of Kala-*
" *mazoo*, 23 Mich., 344; *City of Oakland* vs. *Car-*
" *penter*, 13 Cal., 540).

" **But it is said that it is no objec-**
" **tion to a public franchise that its**
" **owner may derive a private gain**
" **therefrom. This is unquestion-**
" **ably true when the use is public,**
" **and the gain arises out of that**
" **use, such as street cars, tele-**
" **graph and telephone lines.** In
" this case, however, the pecuniary profits
" to Belt arise from a source wholly dis-
" tinct from any public use. They will
" not flow naturally from his right to
" erect and maintain boxes for waste paper, but
" solely from a distinct privilege in which the
" public are not interested, to wit, his exclusive
" right to use the streets for advertising pur-
" poses, a purely private and collateral enter-
" prise. **We are clear that the streets**

"cannot be devoted to such a pri-
"vate purpose. * * * The City
"has no power to let out the side-
"walks and streets to a private
"person for advertising purposes,
"even though he should pay it a
"per cent. of the property."

In that case, as in this, the mere use of the streets for advertising purposes, even though they were not impeded, was held to render the Ordinance invalid *because it permitted the use of public property for private purposes.*

The case just cited was followed in

People *vs.* Clean Street Co., 225 Ill., 470; 9 L. R. A. (N. S.), 455.

IV.

Grants of franchises to public corporations are to be strictly construed. Nothing passes by intendment, and the only powers vested in them are those which are either expressly conferred or are necessarily implied for the purpose of enabling them to transact their public duties.

This proposition is too well settled to merit argument. The later cases discussing it are:

Coosaw Min. Co. *vs.* South Carolina, 144 U. S., 550.

Water Co. *vs.* Knoxville, 200 U. S., 22.

Blair *vs.* Chicago, 201 U. S., 400.

A corporation has, therefore, according to the foregoing rule of construction, no powers whatever excepting those given by its charter or the law under which it is incorporated, either directly or as incidental to its purposes and existence.

Auburn and Cato Plank Road Co. *vs* Douglass, 9 N. Y., 444.

Ren. & Sar. Ry. *vs.* Davis 43 N. Y., 137.

In re N. Y. & H. R. R. Co. *vs.* Kip, 46 N. Y., 546.

Mohawk Bridge Co. *vs.* Utica, etc., Co., 6 Paige, 554.

This rule is very clearly stated by Mr. Justice Miller in

Thomas *vs.* Railroad Co., 101 U. S., 71, 82,

as follows:

> "The powers of corporations organized under "legislative statutes are such, and such only, as "those statutes confer. Conceding the rule ap- "plicable to all statutes, that what is fairly im- "plied is as much granted as what is expressed, "it remains that the charter of a corporation "is the measure of its powers, and that the "enumeration of these powers implies the ex- "clusion of all others."

The proposition laid down by the learned Justice in that case is sustained by the great weight of authority, both in this country and in England. The foregoing rule as to the construction of corporate powers was also forcibly expressed and upheld by Mr. Justice McCay in

Central Railroad Co. *vs.* Collins, 40 Ga., 582,

in the following language:

> "Corporations are too apt to forget this "fundamental law of their being. In the daily "habit of transacting business in the name of "the company as though it were an individual, "they are apt to slide into the notion that a "corporation is an individual in all respects, so "far as business matters are concerned.
>
> "But a corporation is a mere creature of the "law, and only exists at all *for the purposes* "*declared in its charter, and has absolutely no* "*powers but those which the law confers upon* "*it.* It is a creature of the law, and in the very "nature of things is just what the law makes "it, no more, no less; and by the word 'law' "here, I do not mean the general law which reg-"ulates the powers of persons, but the act of "incorporation, the charter, the constitution."

V.

The private business of advertising tobacco, cigarettes, soap and toilet articles is not incidental to the exercise of a public franchise to operate stage coaches for hire.

Corporations possess what are known as "incidental powers," but incindental powers are only such as are absolutely necessary to enable corporations to carry into execution the specific powers conferred upon them by their Charters.

First M. E. Church *vs.* Dixon, 178 Ill., 260; 52 N. E. Rep., 887, 890.

An "incidental power" has also been defined as one which is directly and immediately appropriate to the execution of the specific power granted, and not one which has only a slight or remote relation to it.

Hood *vs.* New York & N. H. R. Co., 22 Conn., 1, 16.

People *ex rel.* Peabody *vs.* Chicago Gas Trust Co., 130 Ill., 268, 283; 8 L. R. A., 497.

Burke *vs.* Mead, 159 Ind., 252; 64 N. E., 880, 883.

State *ex rel.* Jackson *vs.* Newman, 51 La. Ann., 833; 25 So., 408.

Franklin Co. *vs.* Lewiston Sav. Bank, 68 Me., 43, 45; 28 Am. Rep., 9.

An incidental power exists only for the purpose of enabling a corporation to carry out the powers expressly granted to it, that is to say, the powers necessary to accomplish the purpose of its existence, and can in no case avail to enlarge the express powers, and thereby warrant it to devote its efforts and capital to other purposes than such as its charter expressly authorizes, or to engage in collateral enterprises, not directly, but only remotely connected to its specific corporate powers.

People *ex rel.* Moloney *vs.* Pullman's Palace Car Co., 175 Ill., 125; 64 L. R. A., 366.

Alton Mfg. Co. *vs.* Garrett Biblical Institute, 243 Ill., 298; 90 N. E., 704.

Marshalltown Stone Co. *vs.* Des Moines Brick Mfg. Co., — Iowa, —; 126 N. W., 190.

State *vs.* Morgan's L. & T. R. & S. S. Co., 106 La., 513; 31 So., 115.

It necessarily follows, it seems to us, that the exercise of a power which might be beneficial to the principal business is not necessarily incidental to it.

Gause *vs.* Commonwealth Trust Co., 196 N. Y., 134, 144.

People *ex rel.* Healy *vs.* Illinois C. R. Co., 233 Ill., 378; 16 L. R. A. (N. S.), 604.

Burke *vs.* Mead, 159 Ind., 252; 64 N. E. Rep., 880, 883.

Nicollet Bank *vs.* Frisk-Turner Co., 71 Minn., 413; 74 N. W. Rep., 160, 161.

Victor *vs.* Louise Cotton Mills, 148 N. C., 107; 16 L. R. A. (N. S.), 1020.

Thus, in

Curtis *vs.* Leavitt, 15 N. Y., 9, 165,

it was held that *the word "incidental,"* as used in chapter 178 of the Laws of 1831, conferring power on certain associations to carry on the business of banking, by discounting bills, notes and other evidences of debt by receiving deposits, by loaning money on real and personal security, and by exercising such incidental powers as shall be necessary to carry on such business, *means "casual or acci- "dental; beside the main design, occasional."* Taken in connection with the word "necessary," the two may, and probably must mean to authorize those occasional acts of power which are necessitated by the mutual wants of the banks and their customers but which may not fall within the strict letter of the enumerated powers.

In

People *ex rel.* Peabody *vs.* Chicago Gas Trust Co., 130 Ill., 268; 8 L. R. A., 497,

it was held that where a charter in express terms confers on a corporation the power to maintain and

operate works for the manufacture and sale of gas, it is not a necessary implication therefrom that the power to purchase stock in other gas companies should also exist. There is no necessary connection between manufacturing gas and buying stock.

In

Burke *vs.* Mead, 159 Ind., 252; 64 N. E. Rep., 880, 883,

it was held that the manufacture and sale of all kinds of electrical appliances, apparatus and supplies was not incidental to the business of generating electricity.

In

Chewacla Lime-Works *vs.* Dismukes, 87 Ala., 344; 5 L. R. A., 100,

it was held, approving the doctrine laid down by the New York Court of Appeals in *Alexander* vs. *Cauldwell* (83 N. Y., 480), that a coal mining company has no implied authority to buy coal in the market for the purpose of resale as a speculation, and that where the declared objects of a corporation are the mining and manufacture of lime and putting the product on the market, it has no implied authority to carry on a general mercantile business, nor can it buy lime manufactured elsewhere for the purpose of trade and to raise funds to carry on the corporate business.

We might multiply instances on the subject but it is not deemed necessary to do so. The plaintiff-in-error has no more right to engage in the business of plastering its stages with advertising signs than it has to paint advertisements on the front or sides of a building, to send up advertising kites or balloons, or to conduct an advertising newspaper.

It was urged, however, that in the case of a common carrier a different rule applies. And in the Court of Appeals, in its Brief, plaintiff-in-error referred to some English and American cases which it claimed supported its contention. As Mr. Bruce, in his preface to the first edition of his valuable work on "Ultra Vires," informs us the English cases are in hopeless confusion. He says:

> "It is *ultra vires* of the Great Eastern Rail-
> "way Company to run steam-packets from Har-
> "wich (*Colman* vs. *Eastern Counties Ry. Co.*,
> "10 Beav., 1), but not of the South Wales Rail-
> "way Company to run them from Milford
> "Haven (*South Wales Ry. Co.* vs. *Redmond*,
> "10 C. B. N. S., 675). It is *ultra vires* of a
> "steamship company to sell the whole of its
> "vessels except two (*Gregory* vs. *Patchett*, 33
> "Beav., 597), but perfectly legal thus to dis-
> "pose at one swoop of every one of them (*Wil-*
> "*son* vs. *Miers*, 10 C. B. N. S., 348). It is *ultra*
> "*vires* of railway companies to enter into part-
> "nership (*Charlton* vs. *Newcastle & Carlisle*
> "*Ry. Co.*, 5 Jur. N. S., 1097), but not *ultra vires*
> "to make arrangements for dividing the whole
> "of the joint profits among them in fixed pro-
> "portions (*Hare* vs. *L. & N. W. Ry. Co.*, 2 J. &
> "H., 80). It is *ultra vires* of the town of South-
> "hampton (*Attorney General* vs. *Andrews*, 2
> "Mac. & G., 225), or Sheffield (*Reg.* vs. *Mayor,*
> "*etc., of Sheffield*, L. R., 6 Q. B., 652), to incur
> "expense in order to obtain a proper supply of
> "water for their respective inhabitants, but not
> "so for Ashton-under-Lyne (*Bateman* vs.
> "*Mayor, etc.*, 3 H. & N., 323), or Wigan (*Attor-*
> "*ney General* vs. *Mayor, etc.*, 5 De G., M. & G.,
> "52), to do exactly the same thing."

This conflict has given rise to the divergent rulings which have been made in this country. But the general rule is, as stated in

People *ex rel* Moloney *vs.* Pullman's Palace Car Co., 175 Ill., 125; 64 L. R. A., 366,

that

"A power which the law will regard as existing by implication, must be one in a sense necessary—that is, needful, suitable, and proper to accomplish the object of the grant—and one that is directly and immediately appropriate to the execution of the specific powers and not one that has but a slight, indirect, or remote relation to the specific purposes of the corporation."

See,

Hood *vs.* N. Y. & N. H. R. Co., 22 Conn., 502.

Mutual Sav. Bank *vs.* Meridan Agri. Co., 24 Conn., 159.

Naugatuck R. Co. *vs.* Waterbury Button Co., 24 Conn., 468.

Elmore *vs.* Naugatuck R. Co., 23 Conn., 457.

Penna. & Del. Nav. Co. *vs.* Dandridge, 8 Gill & J. (Md.), 248.

Orr *vs.* Lacey, 2 Doug. (Mich.), 230.

Hoagland *vs.* Hannibal & St. Jo. R. Co., 39 Mo., 451.

Root *vs.* Godard, 3 McLean (U. S. C. C.), 102.

Referring to this subject, in

Jacksonville, etc., Railway *vs.* Hooper,
160 U. S., 514,

it was said by Mr. Justice Shiras:

"Although the contract power of railroad "companies is to be deemed restricted to the "general purposes for which they are designed, "yet there are many transactions which are "incidental or auxiliary to its main business, "or which may become useful in the care and "management of the property which it is au- "thorized to hold, and in the safety and com- "fort of the passengers whom it is its duty to "transport.

"Courts may be permitted, where there is no "legislative prohibition shown, to put a favor- "able construction upon such exercise of power "by a railroad company as is suitable to pro- "mote the success of the company, within its "chartered powers, and to contribute to the "comfort of those who travel thereon. To lease "and maintain a summer hotel at the seaside "terminus of a railroad might obviously in- "crease the business of the company and the "comfort of its passengers, and be within the "provisions of the statute of Florida above cited, "whereby a railroad company is authorized 'to "sell, lease, or buy any land or real estate not "necessary for its use,' and *to 'erect and main- "tain all convenient buildings * * * for the "accommodation and use of their passengers.'*

"Courts may well be astute in dealing with "efforts of corporations to usurp powers not "granted them, or to stretch their lawful fran- "chises against the interests of the public. Nor

"would we be understood to hold that, in a "clear case of the exercise of a power forbidden "by its charter, or contrary to public policy, "a railroad company would be estopped to de- "cline to be bound by its own act, even when "fulfilled by the other contracting party. "*Davis* v. *Old Colony Railroad Co.* 131 Mass. "258; *Thomas* v. *Railroad Co.,* 101 U. S., 71; "*Central Transportation Co.* v. *Pullman's Car* "*Co.* 139 U. S., 24. So, too, it must be regarded "as well settled, on the soundest principles of "public policy, that a contract, by which a rail- "road company seeks to render itself incapable "of performing its duties to the public, or at- "tempts to absolve itself from its obligation "without the consent of the State, is void and "cannot be rendered enforceable by the doc- "trines of estoppel. *The New York & Mary-* "*land Railroad Company* v. *Winans,* 17 How., "30; *Thomas* v. *Railroad Company,* 101 U. S., "71; *Central Transportation Co.* v. *Pullman's* "*Car Co.,* 139 U. S., 24.

"We do not seek to relax but rather to affirm "the rule laid down by this court, in *Central* "*Transportation Co.* vs. *Pullman's Car Co.* "(above cited), that 'a contract of a corpora- "'tion, which is *ultra vires,* in the proper sense, "'that is to say, outside the object of its crea- "'tion as defined in the law of its organization, "'and, therefore, beyond the powers conferred "'upon it by the Legislature, is not voidable "'only, but wholly void, and of no legal effect— "'the objection to the contract is not merely "'that the corporation ought not to have made "'it, but that it could not make it. Such a con- "'tract cannot be ratified by either party, be- "'cause it could not have been authorized by

"'either. No performance on either side can "'give the unlawful contract any validity, or "'be the foundation of any right of action upon "'it' 139 U. S., 59, 60.

"But we think the present case falls within "the language of Lord Chancellor Selborne in "*Attorney General* vs. *Great Eastern Railway*, "5 App. Cas., 473, 478, where, while declaring "his sense of the importance of the doctrine of "*ultra vires*, he said: 'This doctrine ought to "'be reasonably, and not unreasonably, under- "'stood and applied, and that whatever may "'fairly be regarded as incidental, or conse- "'quential upon, those things which the Legis- "'lature has authorized, ought not, unless ex- "'pressly prohibited, to be held, by judicial "'construction, to be *ultra vires*.' In the ap- "plication of the doctrine the court must be in- "fluenced somewhat by the special circum- "stances of the case. As was said by Romilly, "M. R., in *Lyde* vs. *Eastern Bengal Railway*, 36 "Beav., 10, where was in question the validity "of a contract by a railway company to work a "coal mine: 'The answer to this argument ap- "'pears to me to depend upon the facts of each "'particular case. If, in truth, the real object "'of the colliery was to supply the railway with "'cheaper coals, it would be proper to allow the "'accidental additional profit of selling coal to "'others; but if the principal object of the col- "'liery was to undertake the business of raising "'and selling coals, then it would be a perver- "'sion of the funds of the company, and a "'scheme which ought not to be permitted, how- "'ever profitable it might appear to be. The "'prohibition or permission to carry on this "'trade would depend on the conclusions which "'the court drew from the evidence.'

"The principle upon which we may safely "rule the present question is within the case of "*Brown* vs. *Winnisimmet Company,* 11 Allen, "326, 334. There a contract, made by the treas- "urer of a ferry company, to lease one of the "company's boats for a certain money consid- "eration was alleged to be void for want of ante- "cedent authority given by the company to the "treasurer, and also because such a contract "was not made in the legitimate exercise of the "company's powers. On the first point it was "ruled that, from evidence showing ratification "by the company, it was proper for the jury to "infer that the treasurer had been duly author- "ized to make the contract, and, disposing of "the second question, the Court, through Chief "Justice Bigelow, said: 'We know of no rule "'or principle by which an act, creating a cor- "'poration for certain specific objects, or to "'carry on a particular trade or business, is to "'be strictly construed as prohibitory of all "'other dealings or transactions not coming "'within the exact scope of those designated. "'Undoubtedly the main business of a corpora- "'is to be confined to that class of operations "'which properly appertain to the general pur- "'poses for which its charter was granted. But "'it may also enter into and engage in transac- "'tions which are incidental or auxiliary to its "'main business, which may become necessary, "'expedient, or profitable in the care and man- "'agement of the property which it is author- "'ized to hold under the act by which it was "'created.'

"See, also,

"*Davis* vs. *Old Colony Railroad,* 131 "Mass., 258, 272.

"The contract between the parties hereto was "for leasing a hotel at the terminus of the rail- "road, situated at a beach, distant from any "town. If not fairly within the authority "granted by the statute of Florida '*to erect* "'*and maintain all convenient buildings* "' * * * *for the accommodation and use* "'*of their passengers,*' it certainly cannot be "said to have been forbidden by such laws. Nor "can it be said to have been in its nature con- "trary to public policy.

"To maintain cheap hotels or eating houses "at stated points on a long line of railroad "through a wilderness, as in the case of the "Pacific railroads, or at the end of a railroad "on a barren, unsettled beach, as in the pres- "ent case, not for the purpose of making money "out of such business, but to furnish reasonable "and necessary accommodations to its passen- "gers and employees, would not be so plainly "an act outside of the powers of a railroad "company as to compel a court to sustain the "defense of *ultra vires* as against the other "party to such a contract."

In view of the elaborate discussions of this subject in

2 Beach, Private Corpns., § 406 (c).
2 Cook, Corporations (6th ed.), § 681.
1 Elliot on Railroads (2d ed.), section 379,
Field, Private Corporations, §§ 53, 54.
4 Thompson, Corporations, § 5638.
1 Wood on Railroads (Minor's ed.), section 170,

and the fact that the proposition for which we contend has been squarely decided in our favor in three

very well considered cases, further consideration of this very interesting subject seems quite unnecessary.

(1) In

Pears *vs.* Manhattan R. R. Co., New York Law Journal of January 3, 1890,

it was held that the elevated railroads in The City of New York had no power to obstruct their station platforms with advertisements.

(2) In

Pittsburg & B. Traction Co. *vs.* Seidell, 6 Pa. Dist. (C. P.), 414; 27 Pittsb. L. J. (N. S.), 441; 19 Pa. Co. Ct., 463,

it was held that a contract made by a street railway company, whereby, for compensation, space both inside and outside its cars was leased for placing advertisements of tradesmen, manufacturers and others, was *ultra vires*.

(3) In

National Car Advertising Co. *vs.* Louisville & Nashville R. R. Co., 110 Va., 413; 66 S. E. Rep., 88; 24 L. R. A. (N. S.), 1010,

it was held by the Virginia Supreme Court of Appeals that in the absence of charter power, express or implied, or of power conferred by general law, a railroad company chartered and doing business as a common carrier of passengers and freight cannot grant to anyone the exclusive privilege of placing advertisements on its box cars and that a contract for such a privilege was *ultra vires* and void.

VI.

The attempted exercise of powers which are not incidental to those which are either expressly granted or necessarily implied, is ultra vires.

It follows, it seems to us, that the two contracts made by the plaintiff with the Railway Advertising Company, dated respectively May 15, 1905, and May 11, 1907, are void and unenforceable.

* Exhibit No. 2, pp. 113-117.
Exhibit No. 1, pp. 109-113.

A reading of these contracts will disclose that the plaintiff-in-error must have been doubtful of its powers in the premises and anticipated some prohibitory action on the part of the City. It provides (p. 112) that the plaintiff-in-error shall have the right to terminate the agreement

> "if at any time any order or judgment of a "court having jurisdiction in the premises shall "be entered, or any act of the Legislature of the "State of New York shall be passed, **or any "ordinance or resolution of The "City of New York or of any "branch of the City Government "shall be adopted, which forbids "the use of the exterior of said "vehicles for advertising purposes** " * * *."

In

> Pearce *vs.* Madison, etc., R. R. Co., 21 How. (U. S.), 441,

where the defendants had purchased a steamboat to run from one of their termini for the purpose of carrying passengers on to another railway, the pur-

chase was held to be *ultra vires*, and they were consequently not liable upon the notes given for the steamboat.

In

Wiswall *vs.* Greenville, etc., Plank Road Co., 3 Jones Eq. (56 N. C.), 183,

it was held that a company incorporated for the purpose of effecting a communication between designated points with the privilege of taking tolls, was not authorized to establish a stage line on its road nor to contract for carrying the mail.

In

Downing *vs.* Mt. Washington Road Co., 40 N. H., 230,

the ruling was that a road company with rather wide powers of acquiring and disposing of buildings, land, etc., could not contract for the purchase of horses and carriages for the purposes of transportation.

In

Penna. Co. *vs.* Dandridge, 8 Gill. & J. (Md.), 248,

it was decided that where a company was incorporated "for the purpose of establishing and conducting a line or lines of steamboats, vessels, and stages and other carriages for the conveyance of passengers" between certain places named, a contract by such company for the breaking of ice and towing of vessels through the track so broken to another place was *ultra vires* and not enforceable against the company.

See, also,

Abbott *vs.* Baltimore Steam Packet Co., 1 Md. Ch. Dec., 542.

In

New Orleans, Florida & H. S. Co. *vs.* Ocean Dry Dock Co., 28 La. Ann., 173,

the holding was that a company formed solely to "dock and repair steamships" cannot engage in "owning and navigating such vessels," or subscribe to the stock of a company so owning.

VII.

The advertisements in question constitute a violation of the City Ordinances.

The power of the Board of Aldermen to pass ordinances is not limited by the enumerations in the Charter. In addition to those specified it may, by proper ordinances, exercise all those powers vested in the City, provided they are not inconsistent with the Charter or with the Constitution of the United States or the Laws of the State of New York.

Revised Charter, section 44.

By section 50, specific authority is given

"to regulate the use of streets and sidewalks by "foot passengers, animals or vehicles; * * * "to prevent encroachments upon and obstruc- "tions to the streets * * * to regulate the "use of the streets for signs, signposts * * * "and other purposes; * * * to regulate the "exhibition of advertisements or handbills along "the streets; and to make all such regulations "in reference to the running of stages, omni- "buses, trucks and cars as may be necessary for

"the convenient use of the streets, piers,
"wharves or stations."

The word "street" is not used in a limited sense, but embraces everything which is included within the meaning of the terms "street, avenue, road, alley, "lane, highway, boulevard, concourse, public place."

Revised Charter, sections 50, 462.

Likewise the word "vehicle" includes "wagons, "trucks, cars, cabs, carriages, stages, omnibuses, "motors, automobiles, locomobiles, bicycles, tri-"cycles, sleighs or other conveyances for persons or "property."

Revised Charter, section 50.

In view of the very general powers conferred by the Legislature upon the defendant-in-error, the plaintiff-in-error has only the right to use the streets for the operation of its stages; beyond that it is subject to the power of the defendant-in-error to declare by Ordinance the manner in which the street shall be used.

Dry Dock, E. B. & B. R. R. Co. *vs.* The Mayor, etc., 47 Hun, 221.

Pursuant to this authority the Board of Aldermen passed certain Ordinances in relation to advertisements, the last one of which, the one which is now in force, will be found at page 22 of the record. It reads as follows:

"Sec. 41. **No advertising trucks,**
"vans or wagons shall be allowed
"in the streets of the Borough of
"Manhattan under a penalty of
"$10 for each offense. Nothing
"herein contained shall prevent
"the putting of business notices
"upon ordinary business wagons,

"so long as such wagons are en-
"gaged in the usual business or
"work of the owner and not used
"merely or mainly for adver-
"tising."

The object and purpose of this Ordinance is obvious. Its design is to prevent all vehicles from carrying advertisements of any description excepting the ordinary business notices on business wagons.

There is no question, at least not on this appeal, of the automobile stages of the plaintiff-in-error being vehicles of some description. They were attempted to be employed in a dual capacity:

(1) As a stage coach for the transportation of passengers; and

(2) As an advertising wagon.

While there may be some doubt about a stage coach being a truck or a van, there surely is none about it being a wagon of some description.

The word "wagon" is synonymous with the word "carriage;" it is a generic term and may be used to designate any wheeled vehicle intended to be drawn by horses.

Luce vs. Hassam, 76 Vt., 450; 58 Atl., 725, 726.

VIII.

The Ordinance in question is a valid exercise of the legislative power of the City.

In determining the validity of any ordinance the only questions to be considered are:

(1) Is the subject matter of the legislation within the powers of the corporation;

(2) Is it in proper form; and

(3) Is it reasonable?

In approaching this subject we must bear in mind that questions relative to the necessity and advisability of the enactment, in the first instance, are to be determined by the municipal authorities; that the presumption is in favor of its validity, and that the courts incline to uphold the judgment and discretion of local legislative bodies.

Ringelstein *vs.* City of Chicago, 128 Ill. App., 483.

(*a*) There can be no doubt of the power of the City to enact the legislation in question. It has express legislative sanction for it.

Revised Charter, sec. 50.

(*b*) There is no question raised as to the form of the ordinance, *i. e.*, was it enacted in the manner prescribed by the Charter?

3. The ordinance is not unreasonable. The general rules which guide the Courts in determining whether an ordinance is reasonable or unreasonable will be found in

McQuillan, Munic. Ordinances, sec. 186.

It should also be borne in mind, in considering this subject, that in this City a state of affairs prevails which is entirely different from that which obtains in most other municipalities in this State, viz., that The City of New York owns the fee of its streets and not merely easements in them for the benefit of the public. The conditions which exist elsewhere are almost reversed. In other municipalities the streets are subject to all uses which are

not forbidden; here, unless permitted by the City, the streets can only be used for strictly street purposes, the rights of travel and transportation.

Even in municipalities where presumably they do not own the fee of the streets, ordinances have been upheld which are somewhat analogous to the one now under consideration.

In

Wettengel *vs.* City of Denver, 20 Colo., 552,

it was held that what is commonly known as the "general welfare clause," giving to the City Council power "to make all ordinances which it may deem necessary or requisite for the good order, health, good government and general welfare of the city," was sufficiently broad to authorize the passage of an ordinance prohibiting the distribution of handbills, etc., in the public streets.

In

Commonwealth *vs.* McCafferty, 145 Mass., 384,

it was held that an ordinance of the City of Lynn, providing that "no person shall place or carry, or "cause to be placed or carried, on any sidewalk, any "showboard, placard or sign, for the purpose of "there displaying the same," was reasonable and valid. The proof showed that the defendant walked upon the sidewalk of a street in the city, having over his shoulders a piece of oil cloth, which he wore like a vest or coat, on which was printed the inscription, "*Lasters on strike. All lasters are requested to* "*keep away from P. P. Sherry until the present,* "*trouble is settled. Per order L. P. U.*" It was held that the defendant's act was a violation of the ordinance and that he was rightfully convicted.

In

Commonwealth *vs.* Plaisted, 148 Mass., 375,

a member of the Salvation Army was arrested while playing on a cornet without a license in a street parade. He created no actual disturbance. It was held that he was an itinerant musician within the meaning of the rules of the Board of Police of the City of Boston; that the rules were valid, and that the defandant was not protected by the fact that his act was done as a matter of religious worship only.

In

Commonwealth *vs.* Ellis, 158 Mass., 555,

it was held that the City Council of Boston may lawfully forbid public selling on the streets; and an ordinance of the city which provided that no person shall sell, on any street or from any building, any goods or articles to any person on the street, except in accordance with a permit from the Superintendent of Streets, was reasonable, constitutional and valid; that the fact that the party complained of had a license from the Commonwealth was immaterial.

In

Philadelphia *vs.* Brabender, 201 Pa. St., 574,

an ordinance forbidding the casting of any paper, advertisement, hand bills, circulars or waste paper not only upon the streets, but also into the vestibules of dwelling houses, was upheld. This case has quite an interesting discussion of the constitutional features of legislation of this character.

But the courts have gone further and have held that not only has a local legislative body power to

regulate the use of the streets, but also that it has the authority to restrict the height of structures which are back of the street line. In the leading case of

City of Rochester *vs.* West, 164 N. Y., 510,

the Court of Appeals held, we quote the syllabus, that

(1) The power conferred upon the City of Rochester by its Charter "to license and regulate "billposters * * * to prescribe the terms and "conditions upon which any such license shall be "granted * * *" authorized the passage of an ordinance prohibiting the erection of billboards exceeding 6 feet in height, excepting with the permission of the Common Council, after notice in writing of the application for the permit, to the owners, occupants or agents of all houses and lots within a distance of 200 feet from where such billboard is to be erected.

(2) The statute conferring such power on the City was within the power of the Legislature, and is not in conflict with any provision of the State or Federal Constitution.

(3) Such ordinance is not unreasonable or an undue restraint of a lawful trade or business, nor a restraint upon the lawful and beneficent use of private property.

(4) The validity of a statute or ordinance is not to be determined from its effect in a particular case, but from its general purpose and its efficiency to effect that end. When a statute is obviously intended to provide for the safety of a community, and an ordinance under it is reasonable and in compliance

with its purpose, both the statute and the ordinance are lawful and must be sustained.

See, also—

Gunning System *vs.* City of Buffalo, 75 App. Div., 31.

These cases were recently approved by the Supreme Court of Illinois in

City of Chicago *vs.* Gunning System, 214 Ill., 628; 2 Am. & Eng. Ann. Cases, 897.

IX.

It being apparent, as previously stated, that no federal questions are involved, the writ should either be dismissed or the Judgment of the State Court affirmed.

Dated April 6, 1911.

Respectfully submitted,

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TERENCE FARLEY,
of Counsel for Defendant-in-Error.

(18707)

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